Supreme Court
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No. 06-___

06-153

IN THE

Supreme Court of the United States

ROWE ENTERTAINMENT, INC., ET. AL.,

Petitioners,

—v.—

THE WILLIAM MORRIS AGENCY, INC., ET. AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Petitioners, African-American concert promoters, were denied the opportunity to negotiate concert promotion contracts with the Respondent booking agents, who collectively control the U.S. concert promotion industry, on the grounds of race. In support of their showing of racial animus, Petitioners submitted evidence that, among other things: (i) Respondents refuse to engage black promoters for their white acts; (ii) Respondents routinely provide to white promoters favorable financial terms that they have never once extended to any black promoter; and (iii) a handwritten note from a CAA executive warned agents to "not divulge" these disparate financial terms to "Black promoters," including specifically the Petitioners here.

The district court ignored all of this evidence, as well as evidence of Petitioners' qualifications as promoters and their repeated efforts to obtain notice of opportunities to contract with Respondents. Instead, after "weighing all of the evidence," the District Court held that the Petitioners failed to satisfy their burden of showing racial animus under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973).

The questions presented are:

1. Whether the Supreme Court's supervisory role is properly invoked to review evidence of institutionalized racially discriminatory practices that broadly infect a prominent U.S. industry, where such evidence appears to have been swept under the rug by the lower federal courts?

2. What is the proper role of the district court in evaluating plaintiffs' showing of prima facie elements under *McDonnell Douglas* where plaintiffs challenge a defendants' repeated failure to provide equal notice of contract bidding opportunities in violation of 42 U.S.C. § 1981?

Rules 14.1 and 29.6 Statements

Pursuant to Supreme Court Rules 14.1 and 29.6, Petitioners state:

1. The Petitioners are Rowe Entertainment, Inc., Summitt Management Corporation, Lee King Productions, Inc., Leonard Rowe, Fred Jones and Lee King.

2. The Respondents are: William Morris Agency, Inc. ("WMA"), Creative Artists Agency, LLC ("CAA"), Renaissance Entertainment, Inc. ("Renaissance"), JAM Productions, Inc. ("JAM") and Beaver Promotions, Inc. ("Beaver").

3. Petitioners Rowe Entertainment, Inc., Summitt Management Corporation and Lee King Productions, Inc. each avers that it has no parent corporations, and that no publicly-held company owns 10% or more of the stock of such Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (221a-226a) is unreported. The opinion of the Court of Appeals denying Petitioner's motion for reconsideration (227-228a) is unreported. The opinion of the district court (1a-220a) is unreported. Because the Court of Appeals decisions do not address Petitioners' arguments on appeal, also annexed to aid the Court's review are Appellant's Brief and Reply Brief, (230a-317a; 475a-520a), opposing briefs (318a-474a), and selected pages from the record below (521a-539a).

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 2005. Petitioners filed a timely motion for reconsideration or rehearing en banc on January 20, 2006, which was denied by the Court of Appeals on May 2, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1245(1).

STATUTES AND REGULATIONS INVOLVED

The text of the sole statute relied on, 42 U.S.C. § 1981, is reproduced at 229a.

STATEMENT OF THE CASE

Introduction

The core of Petitioners' lawsuit is that the Respondent booking agencies routinely deny black concert promoters equal opportunities to enter into concert promotion contracts on racially motivated grounds, in violation of 42 U.S.C. § 1981. Petitioners produced abundant evidence that they were qualified concert promoters; that they amply communicated to Respondents their interests in bidding on Respondents' acts; and that Respondents routinely failed to provide them the notice and opportunities they provided to the "old boys club" of favored white promoters. Petitioners also showed that, on the rare occasions where they did manage to learn of opportunities, Respondents and the favored white promoters engaged in repeated and transparent acts of deception to prevent Petitioners from competing on an even footing.

Most importantly, the Petitioners adduced a plethora of evidence to support the inference that Respondents acted with discriminatory intent. While tens of thousands of contracts were produced in this case, Petitioners pointed out that Respondents cannot produce one—not one—engaging a black promoter for one of Respondents' white acts. (87a-230a). Petitioners also pointed to evidence that white promoters routinely received favorable contractual terms that were, without exception, never offered to any black promoter. (56a-259a). And in what ought to have been a *coup de grace*, Petitioners even produced direct evidence of discrimination, in the form of a handwritten note from a CAA executive containing the admonition that agents "not divulge" such favorable terms to "Black promoters." (538a).

The district court, by its own concession, perceived its role in this case as "'weighing all of the evidence."

(219a). In that capacity, the district court passed judgment on the quality of plaintiffs' experience, the tenacity with which they sought out bidding opportunities and the extent to which they were or were not deceived by the Respondents when they did manage to pursue bids. While the district court's analysis appears detailed on its face, the lengthy decision omits entirely any mention of the disparate contractual terms or—most strikingly—the handwritten note "[do] not divulge guarantees re Black promoters." Moreover, the district court determined that there have been plenty of black promoters of white acts over the years, without acknowledging that none of its cited examples were engaged by the *defendant* booking agencies.

Factual Background of Petitioners' Claims

Petitioners were clearly qualified concert promoters. Petitioner Rowe, for example, showed that he had recently been lead promoter of the successful nationwide "Sugar Daddy" tour, comprising 122 dates at major venues across the United States, (63a-64a), and Petitioner Jones promoted hundreds of shows by major acts during the relevant time period. (72a).

It was also clear that Petitioners repeatedly expressed profound interest in being notified of opportunities to bid on the Respondents' musical acts.[1] Indeed, the barrage of phone calls and letters from Rowe Entertainment and Leonard Rowe on behalf of the Black Promoters Association, of which he was president, led one prominent Respondent executive to announce "I'm sick of you

[1] Plaintiffs wrote several letters to Booking Agency Defendants requesting notice and evincing interest in promoting their acts. *See*, 504a-505.

guys" and to give Rowe a take it or leave it offer to promote one of his acts. (486a).

Nor is there any shortage of record evidence that Respondents routinely provided notice to the white promoters and yet did not provide notice to black promoters. A paradigmatic case in point is Rowe's efforts to obtain notice of opportunities to bid on concerts by CAA client Eric Clapton. The CAA executive handling the tour, upon which Rowe undisputedly sought to bid, admitted that CAA "gave notice to [white] promoters of an upcoming tour of Eric Clapton," with numerous promoters receiving contracts for Clapton dates, and yet never "made any outgoing calls [regarding Clapton] to any black promoter," including Rowe. (524a-525a).

Evidence Supporting Inference Of Racial Animus

The record evidence likewise amply supports the inference that Respondents' failure to provide Petitioners notice of bidding opportunities was racially motivated.

First, the record shows that the standard-issue terms that Respondents extend to the white promoters with whom they do business call for a 0-10% deposit guarantee. (56a-259a). Thousands of contracts in the record bear that fact out. (258a-259a). By contrast, Respondents never make 0-10% terms available to black promoters. With many tens of thousands of promotional agreements in their database, Respondents have been unable to produce a single contract that provided these favorable terms to a black promoter. Instead, virtually without exception, the "black rate" in the concert promotion business dominated by defendants calls for 50% deposit guarantees.

Second, specifically referring to the gulf in these standard-issue guarantee terms, a handwritten note of a CAA executive carries the instruction to "not divulge guarantee re Black promoters." (538a).

Third, Respondents simply do not engage black promoters to represent their white headline acts. While Petitioners have made this claim from the outset of the case, the Respondents have been utterly unable to produce any contrary evidence.

Fourth, even the three or four non-party black promoters that Respondents hold up as prominent successes are universal in their declamations of the pervasive racism they experience in the concert promotion industry. As one such black promoter summed up the general rule: "If you a [black person] you don't [mess] with no white act." (535a). Another testified that, at most, black promoters "may once in a while get a token white act." (523a).

Fifth, former William Morris Agency agent Robert Johnson testified that, "[w]hen a white artist represented by WMA wanted to have a concert in one or more cities . . . [agents] were instructed to book their dates through the dominant promoter in his or her market." Not surprisingly then, Mr. Johnson was able to "recall no instance while he was employed at WMA in which a white artist was promoted by a black promoter." (529a-530a). Moreover, in the event "a black artist gained cross-over appeal and became a major star, those acts were no longer considered 'black' and were handed over to a white promoter." (530a-531a).

Sixth, the principal of Respondent JAM Promotions, the most prolific promoter in the nation, testified that he was "pretty sure that we have co-promoted every black show we have ever done with a black promoter," and did

not recall *ever* having co-promoted a white act with a black promoter. (102a-103a). Beaver's track record is no better. (306a-307a).

In addition, in the handful of cases where Petitioners had opportunities to work with Respondents, or to bid on their acts, the Respondents' actions further lend strong support to the inference of discriminatory animus. So for example, Petitioner Fred Jones and his white partner consistently booked Respondents' major acts in Memphis for many years, where the two men held exclusive promotional rights at the city-owned Mud Island amphitheatre. When Jones' white partner died, Respondent Beaver Promotions wrote to the City of Memphis "at the behest of the major talent agencies," urging the City to terminate the exclusive relationship. (521a-522a). Immediately after receiving the Beaver letter—which clearly threatened that Memphis would lose the booking agencies' considerable business if it renewed the contract with a firm now run by Jones—the City declined to renew the contract for the first time in six years. And even before Jones' deal expired, CAA moved a concert for James Taylor, a prominent white artist, away from Mud Island to a venue controlled by Beaver, which now dominates the music scene in Memphis. (532a-534a; 536a-537a).

Finally, the record is teeming with instances of outright deception, in which the booking agency Respondents took actions to thwart the possibility of Petitioners submitting winning bids for Respondents' acts. *See generally*, (259a-266a). Respondent CAA demonstrably lied to Petitioner Rowe in an effort to keep him from coming in with the high bid to promote the Janet Jackson tour in 1998, telling him that he needed to post $12 million up front in cash, when in fact the Respondent and its client had agreed to accept a deposit of less than half that

amount from a white promoter. (260a-264a). CAA deceived Rowe in a similar fashion in connection with the 1996 Kenny G-Toni Braxton tour, quoting him one price and rival white promoters another. (259a-260a).

The District Court's Decision

The district court held that the Petitioners failed to raise any triable issues of fact with respect to their claims under § 1981, under the familiar burden-shifting framework of *McDonnell Douglas*.

1. District Court's Treatment of Prima Facie Elements

At the outset, the court held plaintiffs failed to make the prima facie showing that they were at least minimally qualified. In this connection, the Court determined that Rowe's extensive experience as a national promoter of *Sugar Daddy* in major venues across the U.S. did not count as relevant experience, because that work was more of a "gospel musical play" than a "concert performance of contemporary music." (64a). The court did not address the evidence that the *Sugar Daddy* tour implicated all the same elements of promotion, and the same venues, as promoting Respondent's major acts. (63a-64a). Nor did it explain why it felt the gospel vs. contemporary music distinction was relevant at all.

The court likewise determined that Petitioners failed to show that they "applied" for the requisite "jobs." Here again, the court ignored Petitioners' evidence of their copious communications with defendants—such as the exchange recounted above regarding Eric Clapton, or the barrage of unsolicited communications that led CAA to announce it was "sick of you guys"—and it made the factual determination that plaintiffs had shown insuffi-

cient initiative in seeking out opportunities to bid on Respondents' acts. *See*, 19a-20a. The court likewise ignored entirely case law that holds the application requirement does not apply where, as here, the fundamental claim is that plaintiffs were deprived of notice of opportunities to bid. *See Mauro v. New England Telecomms., Inc.*, 208 F.3d 384 (2d Cir. 2000).

Strikingly, the district court made a determination that, in the concert promotion industry, notice of bidding opportunities is not provided by booking agencies but must be ferreted out by proactive promoters. (19a-20a). But here again, the court ignored all of Petitioners' evidence. CAA music head Thomas Ross, for example, testified that the way his agency has always "done business" is that, "once an act gave us a [touring] period, the general way an agent would go about booking a tour would be to call promoters." (526a). Agent Dennis Ashley of WMA likewise testified that he would begin booking a tour "by calling promoters, calling promoters I do business with". (539a). The district court opinion ignores all this record evidence in holding that Petitioners failed to meet their prima facie burden.

2. *District Court's Treatment of Evidence of Discrimination*

The district court further took upon itself the task of weighing Petitioners' evidence supporting the inference of discriminatory intent. First, it ignored altogether the handwritten CAA directive to "not divulge guarantees re Black promoters." The court simply does not mention this evidence anywhere in its lengthy decision.

Nor did the district court engage the evidence that the Respondent booking agents' standard terms for the white promoters require 0-10% deposit guarantees, while their

standard terms for black promoters invariably require 50% deposits. The district court simply brushed aside all of this powerful evidence. The Court also discounted Petitioners' evidence that Respondents do not engage black promoters for white headline acts, by citing to black promoters who were engaged by *other booking agents*—not Respondents—to represent white headliners. (495a-496a).

The Court likewise assumed the role of ultimate fact-finder in determining that the testimony of former WMA executive Richard Johnson, regarding WMA's discriminatory practices, was not persuasive because he left WMA twelve years before suit was filed, notwithstanding that Respondents presented no evidence to show that anything at all had changed in the intervening years.

The district court was similarly dismissive of the evidence that JAM has never once co-promoted a white act with a black co-promoter, while co-promoting every black show they've ever done with a black co-promoter. On this point, the district court held that just because JAM's principals can't recall ever engaging a black promoter for a white act doesn't mean it didn't happen. (102a-103a).

The district court also brushed off the staggeringly plain evidence of discrimination relating to the cancellation of the exclusive promotional contract that Petitioner Jones' firm had with Memphis' Mud Island Amphitheater, immediately after the death of Jones' white partner. There was overwhelming evidence that Beaver Promotions' Barry Leff wrote his letter urging the City of Memphis to cut Jones off *at the behest of the Respondent's agents*. The letter itself recites that Leff's "company has been asked by the top talent agencies in the country" to take control over the business in Memphis, now that Jones' white partner had died. At his

deposition, however, he claimed that he was not truthful in the letter; that the Respondent agencies were in fact unaware that he sought to undercut Jones. In "weighing all the evidence," the district court held as a factual matter that Mr. Leff's testimony was truthful, that his letter was untruthful, and that the agencies did not act to strip Petitioner Jones of opportunities to contract for their promotions.

The court did the same thing in crediting the inherently unbelievable testimony of the former mayor of Memphis that he never saw the Leff letter, but that—coincidentally—just after the city received the letter, he decided to reverse course and cut off Jones' exclusive contract, after previously assuring Jones of his support, and after routinely renewing the same contract for many years. (123a-124a).

In all of these incidents—and many, many others too numerous to recount here—the district court clearly usurped the role of the ultimate finder of fact.

The Second Circuit's Decision

The Second Circuit failed utterly to engage the evidence and arguments of the Petitioners, issuing instead the entirely non-substantive decision annexed at 221a-226a. Likewise, Petitioners' motion for rehearing en banc was denied without substantive comment. (227-228a).

REASONS FOR GRANTING THE PETITION

This Court should grant this Petition because the judicial system as a whole suffers greatly if evidence of broad-based institutionalized racism in a significant and highly visible American industry escapes judicial scrutiny. These Petitioners are entitled to have their evidence considered. The page-count of the district court's unpublished decision should not obscure the fact that Petitioners' evidence of racially discriminatory treatment was ignored. And the Second Circuit simply ducked, refusing to engage Petitioners' evidence or legal arguments.

This case also raises the question of the appropriate role of a district court at the summary judgment stage under *McDonnell Douglas*. The court below, when it did not ignore Petitioners' evidence altogether, discounted it in a fashion that is only appropriate for a fact-finder at trial. The district court's holding that Petitioner Rowe was not qualified, for example, rests on a factual assessment that his extensive experience in running a 122-date nationwide tour for *Sugar Daddy*, a gospel music show, is not relevant to the promotion of contemporary music performances in the same venues. This case raises the issue of whether a district judge oversteps his role in making such assessments under the *McDonnell Douglas* test.

I. IMPORTANT SYSTEMIC INTERESTS WARRANT GRANTING THIS PETITION

Petitioners respectfully submit that the federal courts have a special institutional duty under the civil rights laws to ensure that evidence of widespread racially discriminatory practices are not swept under the rug. This institutional imperative is all the greater where the

industry at issue is highly visible, and the discriminatory practices are of a retrograde brand generally associated with bygone decades.

Petitioners further submit that the Supreme Court, by the same token, has a special duty in such cases to exercise its supervisory powers to accept for review cases that might not otherwise present the attributes that ordinarily warrant certiorari review. Sup. Ct. R. 10. Certiorari review is appropriate to protect against the perception—which we as a society can ill afford—that significant evidence of institutionalized racism has gone unexamined. Certainly this is the job of the federal Circuit Courts of Appeal in the first instance. But when the Circuit Courts fail utterly to live up to this important responsibility, it falls to this Court to protect our nation's rawest scabs.

The highly institutionalized nature and long history of the practices at issue here place this case squarely within that category of race discrimination case where the Supreme Court has recognized its special duty. The U.S. concert promotion industry developed at the turn of the last century, at a time when nakedly discriminatory practices were common in the United States. The interests of regionally dominant promoters and a nationally dominant talent agency—the William Morris Agency, founded in 1898—were well served during these early years by unwritten codes of conduct designed to exclude outsiders, particularly blacks.

Of course, the world has changed in the intervening decades. There are now successful African Americans in virtually every walk of life—and indeed, there are some modestly successful black promoters. Moreover, it is likely that the responsible executives of today's dominant cultural institutions, including the Respondent agencies, do not harbor the raw prejudices that their

predecessors did. But the grim reality is that the unwritten codes of exclusionary racial conduct that were developed 100 years ago in this industry continue to serve well the agenda of the dominant white promoters and booking agents today. Racist norms are effective anti-competitive tools in the hands of the entrenched.

Respondents below denigrated this assertion, arguing that racially exclusionary practices would not serve the interests of the booking agencies, who benefit when their artist clients obtain the highest possible guarantees in a free market. And it is true that the best artists are best served by open and free bidding. However, the *talent agencies* are best served by a system comprised of loyal and beholden promoter cohorts, upon whom they can foist any act at any time and achieve at least some middling level of stardom. The agencies' stock in trade is their ability to make stars. In this, they are dependent upon the dominant white promoters, who put their marketing resources behind the acts designated by the major booking agencies. And the loyalty of the dominant promoters is purchased, in part, by the Respondents' continued adherence to a set of racially exclusionary norms that were developed only one generation after passage of the Civil Rights Act of 1866.

II. THIS CASE PRESENTS THE ISSUE OF THE PROPER ROLE OF THE COURT IN EVALUATING EVIDENCE IN CLAIMS BASED ON A FAILURE TO PROVIDE EQUAL NOTICE OF BIDDING OPPORTUNITIES

The district court decision in this case reflects significant confusion regarding the proper role of a district judge in evaluating the sufficiency of evidence proffered in satisfaction of the prima facie elements first articulated by this Court in *McDonnell Douglas*.

As this Court has held, the summary judgment standard means:

> that "[i]f reasonable minds could differ as to the import of the evidence," the motion must be denied, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251, 91 L. Ed. 2d 202, 106 S. Ct. 2505, 2511 (1986). To be entitled to prevail at this stage, therefore, [the defendant-movant] must have submitted "specific, concrete facts," *Warth v. Seldin*, 422 U.S. 490, 508, 95 S. Ct. 2197, 2210, 45 L. Ed. 2d 343 (1975), which when "viewed in the light most favorable" to [plaintiff] "foreclose" all reasonable inferences that [plaintiff] was not injured by the Act, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L. Ed. 142 (1970).

Wyoming v. Oklahoma, 502 U.S. 437, 465-66, 112 S. Ct. 806 (1992) (Scalia, J., dissenting).

However, while it is crystal clear that courts in civil rights cases may not take it upon themselves to weigh the evidence or grant summary judgment in the face of conflicting evidentiary submissions—which the District Court clearly did in this case—significant confusion surrounds the proper standard for evaluating a plaintiff's prima facie showing, including the element that a plaintiff "applied" for the position in question. This confusion is at its most acute where, as here, the claim is that the defendants, in a § 1981 contract bidding case, failed to provide plaintiffs equal notice of opportunities to contract.

Indeed, this Court has not had occasion to elucidate the proper summary judgment standards for cases where the claim is a failure to provide notice of bidding or contracting opportunities. Clearly, the *McDonnell Douglas*

requirement that a plaintiff must have "applied" for the position has no application here. Petitioners respectfully contend that this point was clearly lost on the District Court, which accorded dispositive weight to defendants' assertions that the plaintiffs' attempts to bid were inadequate.

At most, some federal circuit courts have addressed the issue of whether the "application" requirement may properly be applied in an employment context, where an employer fails to post notice of a job opportunity. *See Williams v. Giant Food, Inc.*, 370 F.3d 423, 431 (4th Cir. 2004) (" 'requiring the plaintiff to show that he or she applied for the specific jobs at issue would be unrealistic' where the employer did not post the vacancy") (quoting *Mauro v. S. New England Telecomms., Inc.*, 208 F.3d 384, 387 (2d Cir. 2000).

However, the issue here is one that has never been addressed—namely, what must a plaintiff show in order to demonstrate that he/she was denied notice of bidding opportunities based on race? Here, the evidence of repeated letters to the Respondents seeking opportunities for black promoters, coupled with the history and practices of this particular industry, make clear that an open and race neutral notification system is the only way to ensure that the booking agent Respondents provide equal contracting opportunities. While reasonable people may argue about the form such a system must take to come up to constitutional standards, the District Court wrongly believed itself entitled to weigh and discount all of Petitioners' copious evidence of efforts they made to procure chances to bid.

CONCLUSION

Whatever the proper standard may be, it surely is not one that allows the district court to weigh all of the evidence, discounting what it chooses to discount and ignoring unmistakable indicia of racial bias, as it sees fit. For all of these reasons, therefore, Petitioners respectfully submit that review should be granted in this extraordinary case.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT NEW YORK

No. 98 Civ. 8272(RPP)
January 5, 2005

ROWE ENTERTAINMENT, INC., LEONARD ROWE, SUN SONG PRODUCTIONS, INC., JESSE BOSEMAN, SUMMITT MANAGEMENT CORPORATION, FRED JONES, JR., LEE KING PRODUCTIONS, INC., and LEE KING,

Plaintiffs,

—v.—

THE WILLIAM MORRIS AGENCY, INC., CREATIVE ARTISTS AGENCY, LCC, RENAISSANCE ENTERTAINMENT, INC., JAM PRODUCTIONS, LTD., and BEAVER PRODUCTIONS, INC.,

Defendants.

Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, Stuart, FL, By: Willie E. Gary, Maria Sperando, William Campbell, Laura L. Mall, Ali Gary, Jim Montalvo, Tricia Hoffler, Ivie, McNeill & Wyatt, Citigroup Center, Los Angeles, CA, By: Rickey Ivie, Kendall E. James, for Plaintiffs.

Loeb & Loeb, LLP, New York, NY, By: Michael P. Zweig, Helen Garvaris, Charles Miller, for The William Morris Agency, Inc.

Weil Gotshal & Manges, LLP, New York, NY, By: Jeffrey S. Klein, Pierre G. Armand, Andrea Berner, Beverly R. Frank, Dewey Ballantine, LLP, New York, NY, By: Jeffrey L. Kessler, for Creative Artists Agency, LLC.

Manatt, Phelps & Phillips, LLP, New York, NY, By: Steve M. Hayes, Greg Clarick, Orin Snyder, for Renaissance Entertainment, Inc.

Piper Rudnick, Chicago, IL, By: James D. Roberts, Peter M. Ellis, George L. Grumley, for Jam Productions, Ltd.

Emmett, Cobb, Waits & Kessenich, New Orleans, LA, James A. Cobb, Jr., for Beaver Productions, Inc.

OPINION AND ORDER

PATTERSON, J.

This opinion will address the motions of Defendants William Morris Agency, Inc. ("WMA"), Creative Artists Agency, LLC ("CAA") and Renaissance Entertainment, Inc. ("Renaissance") (collectively, the "Booking Agency Defendants"), and Jam Production, Ltd. ("Jam") and Beaver Productions, Inc. ("Beaver") (collectively, the "Promoter Defendants"), for summary judgment on the Amended Complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure.[1, 2]

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[1] Rule 56.1 of the Local Civil Rules of the Southern District of New York requires parties moving for summary judgment to submit "a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried." Local Civil Rule 56.1(a) (2003). The facts set forth in a mov-

(footnote 2 appears on following page)

The action, filed on November 19, 1998, is brought by four African-American owned concert promoter com-

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ing party's statement "will be deemed to be admitted for purposes of the motion unless controverted" by the opposing party's statement. Local Civil Rule 56.1(c). All statements "must be followed by citation to evidence which would be admissible" under the Federal Rules of Evidence. Local Civil Rule 56.1(d).

The Booking Agency Defendants have moved to strike all Plaintiffs' Local Civil Rule 56.1 Statements as not in compliance with the Local Civil Rules, as well as Plaintiffs' affidavits not in compliance with Rule 56(e) of the Federal Rules of Civil Procedure. (Booking Agency Defs.' Mem. in Supp. of Mots. to Strike, dated May 23, 2003 ("Joint Mem. Supp. Mot. Strike").) The Court issued orders on May 30, 2003, and June 2, 2003, notifying Plaintiffs that their responses were not in compliance with Local Civil Rule 56.1, together with an instructing memorandum. Plaintiffs amended their Local Civil Rule 56.1 Statements on June 16, 2003. (*E.g.*, Pls.' Am. Local Rule 56.1 Stmt. of Disputed Facts in Supp. of Pls.' Opp'n to Booking Agency Defs.' Joint Mot. for Summ. J., dated June 16, 2003 ("Pls.' Am. Joint 56.1 Stmt.").) Because these statements are still argumentative and conclusory, and often not supported by citations to evidence, the Court will strike for failure to comply with Local Civil Rule 56.1 the portions of the Plaintiffs' Rule 56.1 Statements and supporting affidavits that constitute argument and conclusory statements not shown to be made on an affiant's personal knowledge. *See Hollander v. American Cyanamid Co.*, 172 F.3d 192, 198 (2d Cir.1999). The Court will also disregard all statements in the affidavits that do not meet the standard of response required by Rule 56(e) of the Federal Rules of Civil Procedure. *See Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73 (2d Cir.2001) ("A district court has broad discretion to determine whether to overlook a party's failure to comply with local court rules.").

[2] Plaintiffs move to strike the affidavit of Geraldine G. Papa, dated May 23, 2003. This affidavit by a paralegal consists of her itemization of misrepresentations contained in Plaintiffs' Response to the Defendants' Motions for Summary Judgment and her interpretation of the correct interpretation of the underlying deposition testimony. As Plaintiffs point out, the filing of the affidavit gave the Defendants fifteen extra pages to reply to Plaintiffs' opposition papers, in violation of the Court's instructions on the length of memoranda to be submitted to the Court. On the other hand, Plaintiffs

panies and their owners: Rowe Entertainment, Inc. ("Rowe Entertainment"), Leonard Rowe, Sun Song Productions, Inc. ("Sun Song"), Jesse Boseman, Summitt Management Corporation ("Summitt"), Fred Jones, Jr., Lee King Productions, Inc. ("King Productions"), and Lee King.[3] (Pls.' Am. Compl., dated Aug. 9, 1999 ("Am. Compl."), ¶¶ 12, 14-16.)

The Amended Complaint originally charged eight talent and booking agency defendants,[4] each controlled by white persons and doing business throughout the United States, and twenty-six concert promoter defendants,[5] each doing business in the United States and controlled by white persons, with violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and of the Civil Rights Act of 1866 and 1991, 42 U.S.C. §§ 1981, 1985(3) and 1986. (*Id.* ¶¶ 2-3, 5, 18-25, 29-55.) Due to stipulated

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have used smaller type size, larger margins and different spacing than the Court's rules contemplate to comply with the page limitations. The Court has found that there have been numerous misrepresentations of testimony or half truths in the Plaintiffs' responsive papers, which would derogate from the Defendants' flow of argument and Defendants had little choice but to supplement their legal argument in this fashion. In point of fact, as one can discern from the length of this opinion and the time elapsed since argument, the Court has laboriously concluded an intensive review of the mountain of unorganized materials presented in those motions and did not rely on the Papa affidavit for its determinations. Nevertheless, because the Papa affidavit constitutes an unauthorized briefing, the Court grants the Plaintiffs' motion.

[3] Originally, BAB Productions, Inc. and Bernard Bailey were named as Plaintiffs (Am.Compl.¶ 13), but these Plaintiffs voluntarily discontinued their claims during discovery.

[4] Three additional booking agencies are named as "talent agent conspirators" but are not named as defendants. (*Id.* ¶ 28.)

[5] Three additional concert promoters are named as "concert promoter co-conspirators" but are not named as defendants. (*Id.* ¶ 57.)

orders of dismissal since the filing of the Amended Complaint, only two concert promoter companies, Jam and Beaver, and three talent and booking agencies, WMA, CAA, and Renaissance, remain in this action.

I. BACKGROUND

A. *General Nature of Claims in Amended Complaint*

Plaintiffs allege "violations of antitrust and civil rights laws in connection with the promotion of live concert performances throughout the United States of pop, rock and urban music ('contemporary music') (hereinafter referred to as 'concerts' or 'contemporary music concerts')." (Am.Compl.¶ 1.) The Amended Complaint also asserts:

> [b]ecause of an all-white concert promotion fraternity, the black concert promoters are systematically excluded from the promotion of concerts given by white performers. No black promoter, including plaintiffs, has been able to contract to promote a contemporary music concert given by a white artist, or even been given the opportunity to bid on such promotion. In addition, plaintiffs are regularly excluded from the promotion of concerts given by top-drawing black performers.

(*Id.*)

The Amended Complaint states that the Booking Agency Defendants, "which are all controlled by white persons, represent performers in booking concerts" and "engage promoters to promote concerts in the particular geographic areas in which concerts are to be presented." (*Id.* ¶ 2.) Additionally, it states that "[t]he selection of

each promoter is within the discretion of the agent." (*Id.*)[6]

The Amended Complaint goes on to state that, as a product of an illegal conspiracy among the Defendants and others to boycott and exclude Plaintiffs and to discriminate against them on the basis of race in violation of section 1 of the Sherman Antitrust Act and the Civil Rights Acts of 1866 and of 1991, "[t]he booking agency defendants refer their promotion business of white acts exclusively to white promoters, predominantly to the promoter defendants," and "plaintiffs are often excluded from promoting concerts given by most popular black artists." (*Id.* ¶ 4.)

The Amended Complaint contains six claims: (1) a conspiracy to restrain trade in violation of section 1 of the Sherman Act claiming damages; (2) injunctive relief for violation of section 1 of the Sherman Act; (3) intentional wrongful discrimination on the basis of race concerning Plaintiffs' right to make and enforce contracts in violation of 42 U.S.C. § 1981; (4) conspiracy to deprive Plaintiffs of the equal protection of the laws and equal privileges and immunities under the laws, including the right to make and enforce contracts, in violation of 42 U.S.C. § 1985(3); (5) injunctive relief for violation of 42 U.S.C. §§ 1981 and 1985(3); (6) violation of 42 U.S.C. § 1986 for each Defendant's failure to act or prevent the conspiracy to discriminate against Plaintiffs. (*Id.* ¶¶ 95-114.)

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[6] Plaintiffs have acknowledged that ultimate approval of the selection of a promoter rests with the artists and the artists' managers. (Dep. of Mario Gonzalez, dated Feb. 13, 2003 ("Gonzalez Dep."), in Booking Agency Defs.' J.A. in Supp. of Mots. for Summ. J ., dated Feb. 28, 2003 ("J.A."), Vol. IV, at 233 (containing statement by Ms. Sperando, counsel for Plaintiffs, "agree[ing] that the final approval of a promoter rests with the manager . . . . [o]r the artist").)

Unless stated otherwise, the facts that follow are undisputed.

B. *Parties to the Litigation*

1. *Plaintiffs*

Plaintiff Rowe Entertainment is a corporation organized and existing under the laws of Georgia since 1998. (*Id.* ¶ 12; Booking Agency Defs.' Joint Rule 56.1 Stmt. of Undisputed Material Facts, dated Feb. 28, 2003 ("Joint 56.1 Stmt."), ¶ 53.) Rowe Entertainment has its primary place of business in Atlanta, Georgia. (Am.Compl.¶ 12.) Plaintiff Leonard Rowe is its sole shareholder and president. (*Id.*) Mr. Rowe has been in the concert promotion business for twenty-six years. (Joint 56.1 Stmt. ¶ 52.)

Plaintiff Sun Song is a corporation organized and existing under the laws of New York since 1976. (Am.Compl.¶ 14.) Sun Song has its principal place of business in New York, New York, and has operated in New York and along the East Coast of the United States. (*Id.*) Plaintiff Jesse Boseman is its sole shareholder and chief executive. (*Id.*)

Plaintiff Summitt is a corporation organized and existing under the laws of Delaware since 1984. (*Id.* ¶ 15.) [7] Summitt has its principal place of business in Memphis,

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[7] In Mr. Jones's declaration, dated February 25, 2003, he states that Summitt "has been in existence since 1986." (Decl. of Fred Jones, dated Feb. 25, 2003 ("Jones Beaver Decl."), attached as Ex. 1 in Exs. Pls. Resp. in Opp'n to Beaver's Mot. for Summ. J., dated Mar. 13, 2003 ("Pls.' Beaver Exs."), ¶ 2.) In Plaintiffs' other papers, however, they cite 1984 as the founding date. (Pls.' Am. Joint 56.1 Stmt. ¶ 122; Dep. of Fred Jones, dated May 7, 2001 ("Jones Dep."), in J.A., Vol. IV, at 19.) Accordingly, for the purposes of this opinion, the Court will consider 1984 as the correct date.

Tennessee, and promotes primarily in the Memphis metropolitan region. (*Id.*) Plaintiff Fred Jones is its sole shareholder and president. (*Id.*)

Plaintiff King Productions is a corporation organized and existing under the laws of Mississippi since 1976. (*Id.* ¶ 16.) King Productions has its principal place of business in Jackson, Mississippi, and operates primarily in the southern United States. (*Id.*) Plaintiff Lee King is the sole shareholder and chief executive. (*Id.*)

2. *Promoter Defendants*

Defendant Jam is an Illinois corporation with its principal place of business in Chicago, Illinois. (*Id.* ¶ 49.) Jam is owned and operated by Arny Granat and Jerry Mickelson, who are both Caucasian. (Pls.' Rev. Local Rule 56.1 Stmt. of Disputed Facts in Supp. Opp'n to Jam's Mot. for Summ. J., dated Mar. 12, 2003 ("Pls. Rev. Jam 56.1 Stmt."), ¶ 1.) Plaintiffs assert that Jam has promoted an average of 600 to 700 shows or more per year and between 400 to 1,200 events in 2001 and 2002. (Pls.' Rev. Jam 56.1 Stmt. ¶¶ 3-4 (citing Dep. of Arny Granat, undated ("Granat Dep."), attached as Ex. 2 in Exs. Pls.' Rev. Mem. in Opp'n to Jam's Mot. for Summ. J., undated (received Mar. 13, 2003) ("Pls.' Rev. Jam Mem. Exs."), at 25-26, 233-34).) Defendant Jam asserts that Plaintiffs' figures are nationwide figures that include events other than music concerts and that Jam promoted an average of 200 to 300 music concerts in Chicago each year. (Decl. of Jerry Mickelson, dated Mar. 13, 2003 ("Mickelson Decl. II"), attached as Ex. 1 to Decl. of James D. Roberts, dated Mar. 13, 2003 ("Roberts Decl."), ¶ 18.)

Defendant Beaver is a Louisiana corporation with its principal place of business in New Orleans, Louisiana. (Am.Compl.¶ 29.) Beaver has promoted concerts for

over thirty years. (Decl. of Don Fox, dated Feb. 14, 2003 ("Fox Decl."), attached as Ex. 1 in Exs. Beaver's Mem. in Supp. of Mot. for Summ. J., undated (received Feb. 20, 2003) ("Beaver Exs."), ¶ 3.) Don Fox is the president and sole shareholder of Beaver. (Beaver's Stmt. of Uncontested Material Facts Pursuant to Local Rule 56.1, dated Feb. 19, 2003 ("Beaver 56.1 Stmt."), ¶ 4.)[8] Barry Leff is the vice-president. (*Id.* ¶ 5.) Both Don Fox and Barry Leff are Caucasian. (Pls.' Revised Stmt. of Contested Material Facts Pursuant to Local Rule 56.1, dated Mar. 24, 2003 ("Pls.' Rev. Beaver 56.1 Stmt."), ¶ 7.) Beaver has promoted an average of 200 concerts per year throughout North America, the majority[9] of which have taken place in the Greater New Orleans area. (Fox Decl., Beaver Ex. 1, ¶ 3; Dep. of Barry Leff, undated ("Leff Dep."), Pls.' Beaver Ex. 4, at 104.)

3. *Booking Agency Defendants*

Defendant WMA is a privately held company founded in 1898, with its principal offices in Beverly Hills, New York City and Nashville. (WMA's Stmt. Undisputed Material Facts Pursuant to Local Civil Rule 56.1, dated Feb. 28, 2003 ("WMA 56.1 Stmt."), ¶ 1.) WMA represents clients in various entertainment fields, including music, television, books, theatre and movies. (*Id.* ¶ 2.) WMA's music division has approximately sixty agents and represents over 500 artists. (*Id.* ¶ 4.) When an agent in WMA's music department receives a bid or bona fide offer concerning an upcoming show or tour, WMA's pol-

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[8] Plaintiffs dispute Beaver 56.1 Stmt. ¶ 4 in part, but present no disagreement to this part of the paragraph. (Pls.' Resp. to Beaver's "Undisputed Facts", dated June 11, 2003 ("Pls.' Resp. Beaver 56.1 Stmt."), ¶ 4.)

[9] Beaver uses the term plurality, but if majority is substituted for plurality, then this statement is undisputed. (*Id.* ¶ 6.)

icy is to transfer the bid or offer to the artist or the artist's manager. (*Id.* ¶5.)[10] The artist or the artist's manager makes the final decision as to whether to accept the bid or offer. (*Id.* ¶6.)[11]

Defendant CAA was incorporated as a limited liability company under the laws of Delaware on or about August 18, 1995. (CAA's Stmt. of Undisputed Material Facts, dated Feb. 28, 2003 ("CAA 56.1 Stmt."), ¶1.) Its principal place of business is Beverly Hills, California. (Am.Comp.¶19.) CAA's music department represents musical artists in the booking of live musical performances. (CAA 56 .1 Stmt. ¶5.) CAA currently employs approximately twenty-eight music agents and represents over 200 musical artists. (*Id.*) CAA's music clients include artists "whose musical styles encompass many different genres of music, including pop, rock, urban,

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[10] Plaintiffs dispute WMA 56.1 Statement ¶5, citing the affidavit of Richard Johnson, a former WMA employee, to refute WMA's assertion that it forwards all bona fide offers to artists or their managers. (Pls.' Am. Local Rule 56.1 Stmt. of Disputed Facts in Supp. of Opp'n to WMA's Mot. for Summ. J., dated June 16, 2003 ("Pls.' Am. WMA 56.1 Stmt."), ¶4 (citing Aff. of Richard Johnson, dated Jan. 19, 2001 ("R. Johnson Aff."), attached as Ex. 9 in Exs. Pls.' Resp. in Opp'n to WMA's Mot. for Summ. J., undated (received May 5, 2003) ("Pls.' Resp. WMA Exs."), ¶3).) However, Mr. Johnson was employed in the music division of Defendant WMA as a booking agent from 1982 to 1986, twelve years before the filing of this complaint, and has been employed in an unrelated economic area ever since. (R. Johnson Aff., Pls.' Resp. WMA Ex. 9, ¶1.) The cited evidence is insufficient to controvert WMA 56.1 Statement ¶5, and this statement is considered as if undisputed.

[11] Plaintiffs dispute WMA 56.1 Statement ¶6. However, the evidence cited by Plaintiffs does not controvert the statement that the artists or their managers make the final decision. (Pls.' Am. 56 .1 Stmt. ¶6.) Thus, WMA 56.1 Statement ¶6 is considered as if undisputed. Additionally, Plaintiffs have admitted that this assertion is true. *See supra* note 6.

R & B, jazz, country and western, Latin, gospel and Christian music." (*Id.* ¶6.) Each year, CAA's music agents are involved in booking thousands of concert dates for its music clients, both nationally and internationally. (*Id.* ¶7.)

Defendant Renaissance was incorporated under the laws of New York in February 1996. (Renaissance's Stmt. Pursuant to Local Rule 56.1, dated Feb. 28, 2003 ("Renaissance 56.1 Stmt."), ¶1.) David Zedeck was the sole principal and president of Renaissance. (*Id.* ¶4.) On December 31, 1999, Renaissance ceased all business operations and sold its assets to Evolution Talent Agency, LLC, which was started by David Zedeck and a partner. (*Id.* ¶¶3-4 .)[12] During its operation, Renaissance provided booking agent services to musical artists in connection with their live events. (*Id.* ¶5.) Before November 1998, when this action was filed, Renaissance employed no more than three booking agents and had booked fewer than 90 domestic concerts for its represented artists. (*Id.* ¶¶6-7.) After November 1998, Renaissance added three more agents. (*Id.* ¶6.)

C. *The Contemporary Music Concert Promotion Business*

The concert promotion business evidently started in the late 1960s or early 1970s. (Dep. of Stephen Alexander Cooley, dated Mar. 20, 2002 ("Cooley Dep."), in Exs. Pls.' Am. Local Rule 56.1 Stmt. of Disputed Facts in Supp. of Pls.' Opp'n to Booking Agency Defs.' Mot. for Summ. J., dated June 16, 2003 ("Pls.' Am. Joint 56.1 Stmt. Exs."), Vol. II, at 97.) Plaintiffs' claims are

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[12] Plaintiffs assert that Renaissance and Evolution are substantially the same companies. (Pls.' Resp. Renaissance's Stmt. Pursuant to Local Rule 56.1, dated June 13, 2003 ("Pls.' Resp. Renaissance 56.1 Stmt."), ¶¶3-4.)

founded on disparities that have arisen since the beginning of this industry. As Plaintiffs' counsel asked at the argument on these summary judgment motions, why is it that all white and black promoters started out at the same time and "all of the white [dominant] promoters now have venues, megabucks, all of the acts, and the vast majority of the blacks do not?" (Hrg. Tr. 10/16/03 at 191.)

1. *Allegations in Amended Complaint*

In the Amended Complaint, Plaintiffs assert, "Artists who perform live in concert generally engage booking agencies to procure their engagements. These agencies select and contract with promoters, functioning in particular geographic locations, to present the concerts." (Am.Compl.¶ 59.) Furthermore,

> [a] booking agent, acting on behalf of an artist, contacts a concert promoter in order to retain its services to produce a concert at a particular location, on an agreed date. Sometimes two or more promoters co-promote concerts, and share profits and losses. . . . The artist's fee is usually the greater of (a) 85% of net concert revenues (gross revenues less expenses,[13] which include rent, advertising, stage hands, sound, lights, security and the like), or (b) a minimum guaranteed fee. Major artists can command as much as 90% of net concert revenues. A booking agent typically receives between 5 and 10%

[13] Under the form contracts negotiated by the Defendant Booking Agency Defendants and submitted on these motions, the expense amounts are agreed upon and, if they exceed that amount, are born by the promoter. In accounting for the net concert revenues, the promoters are required to show that the agreed upon expenses were incurred in promoting the concert. (Report of Mario Gonzalez, Esq., undated ("Gonzalez Report"), in J.A., Vol. I, ¶ 10(d).)

> of an artist's fee. A promoter generally receives the remaining 15% of net revenues, or the amount remaining after the artist's minimum guaranteed fee is paid.

(*Id.* ¶ 60.)

Under the contract between the artist and the promoter, the promoter is obligated

> [to] rent or otherwise secure the venue where the concert will take place. Venues include small clubs, large clubs, college gyms, auditoriums, outdoor amphitheaters (commonly called "sheds"), large sports arenas and stadiums. Some promoters own or have exclusive booking arrangements with specific venues. If another promoter wishes to promote a concert in such a venue, arrangements can be made with the promoter controlling the venue.

(*Id.* ¶ 61.)

Once the artist or artist's manager and promoter enter into a contract for a performance on a particular date at a particular venue, the promoter "advertises the concert, arranges security and performs other tasks to present the concert," including "sell[ing] tickets to the public, either directly or through ticket sales outlets." (*Id.*)

2. *Role of Booking Agencies and Concert Promoters*

It is undisputed that in the concert promotion business, the concert promoters are the buyers of the talent or artist, and the booking agencies are the sellers of the talent or artist. (Beaver 56 .1 Stmt. ¶ 12; Pls.' Resp. Beaver 56.1 Stmt. ¶ 12; Jam's Local Rule 56.1 Stmt. Undisputed Facts in Supp. of Mot. for Summ. J., dated Jan. 29, 2003 ("Jam 56.1 Stmt."), ¶ 14; Dep. of Leonard Rowe, dated Aug. 14, 2001 ("Rowe Dep."), attached as

Ex. 6 to Decl. of Monica Petraglia McCabe, Esq., dated Jan. 29, 2003 ("McCabe Decl."), at 1233; Dep. of Bernard Bailey, dated July 26, 2001 ("B. Bailey Dep.") attached as Ex. 7 to McCabe Decl., at 885; Dep. of Fred Jones, dated May 9, 2001 ("Jones Dep."), attached as Ex. 9 to McCabe Decl, at 685-86; Dep. of Lee King, dated May 2, 2001 ("King Dep."), attached as Ex. 10 to McCabe Decl., at 686-87.) The concert promotion business is built on relationships that develop over time among artists, managers, promoters, agents, vendors and radio stations. (Joint 56.1 Stmt. ¶ 1.)[14]

An artist's manager generally oversees all aspects of the artist's career and may also engage a booking agent to route and book concert tours for the artist. (*Id.* ¶¶ 2-3.) The booking agent reports to the artist either directly or, often, through the manager. (*Id.* ¶ 4.)

The artist or the artist's manager may designate the number of concerts, the period during which they would be performed, and the artist's preference for locale, for venue and for promoter, among other aspects. (Dep. of Ronald Weisner, dated Apr. 3, 2002 ("Weisner Dep."), in J.A., Vol. VI, at 21-26.) The agent at the booking agency then solicits and obtains offers to present to the artist or artist's manager, among other tasks. (*Id.* at 27.) As Plaintiffs admit, " 'One important part of an agent's job is to maximize opportunities to generate revenue for an artist and to promote the artist's career, while minimizing any potential downside risks.' " (Pls.' Local Civil Rule 56.1 Stmt. Resp. CAA's Mot. Summ. J., dated June 25, 2003 ("Pls.' Resp. CAA 56.1 Stmt."), ¶ 9 (admitting in part

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[14] Plaintiffs state that Joint 56.1 Statement ¶ 1 is disputed. (Pls.' Am. Joint 56.1 Stmt. ¶ 1.) Plaintiffs' reply, however, is unresponsive and does not controvert the statement of material fact provided by Booking Agency Defendants, as required by Local Rule 56.1(d). Joint 56.1 Statement ¶ 1 is considered as if undisputed.

CAA 56.1 Stmt. ¶9) (quoting Decl. of Robert Light, dated Feb. 27, 2003, ("Light Decl. I"), ¶7).) Although the ultimate decision as to whether to enter into a contract with the concert promoter belongs to the artist or the artist's manager, it is Plaintiffs' position that most artists delegate this decision to their agents. (Pls.' Am. Joint 56.1 Stmt. ¶33.)

The concert promoter or co-promoter, as these terms are used by the parties, shares in the profits and losses of the concert. The concert promoter— sometimes referred to as the "lead promoter"—is the entity that acquires the act and contracts with the artist. (Joint 56.1 Stmt. ¶5.)[15] Generally, the promoter negotiates the terms of the concert with the agent, subject to the approval or direction of the artist or the artist's manager. (Gonzalez Dep., in J.A., Vol. IV, at 233.) The promoter is responsible for all financial obligations of the show, including the artist's guarantee, the building deposit, production cost and advertising. (Joint 56.1 Stmt. ¶6;[16] Rowe Dep., in J.A., Vol. VI, at 81-82.) This includes the obligation to pay for advertising and all show expenses, regardless of how much money is generated by ticket sales. (Joint 56.1 Stmt. ¶7.) Due to this obligation, a promoter can end up losing money on any concert, even when a concert was expected to be profitable. (*Id.* ¶8.)

A lead promoter may retain the services of a "co-promoter" to assist the lead promoter with certain promotion tasks inside a particular market. (*Id.* ¶9.)[17] A

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[15] Plaintiffs dispute this statement, but as their reply is non-responsive (Pls.' Am. Joint 56.1 Stmt. ¶5), Joint 56.1 Statement ¶5 is considered as if undisputed.

[16] Plaintiffs' reply is non-responsive (Pls.' Am. Joint 56.1 Stmt. ¶6); Joint 56.1 Statement ¶6 is considered as if undisputed.

[17] Plaintiffs' reply is non-responsive and relies on conclusory remarks included in Mr. Rowe's affidavit and deposition. Plaintiffs

promoter may be required to have a co-promoter by the artist, the manager, or the booking agent, or a lead promoter may retain a co-promoter because the co-promoter has particular knowledge of the territory in which the concert is performed. Promoters often select co-promoters based on previous relationships. (*Id.* ¶ 10.)[18] A co-promoter has a financial interest in the show and will share in the profits or losses. (Jones Dep., in J.A., Vol. IV, at 559.) A promoter also may retain "street promoters" or "consultants" who typically receive a flat fee for assisting in a local market with such tasks as advertising and poster and flyer distribution. (Joint 56.1 Stmt. ¶ 11.) Unlike co-promoters, street promoters and consultants do not share in the promotion risks. (*Id.*)

In recent years, some artists or artists' managers have asked booking agencies to solicit bids from concert promoters to produce nationwide tours. A "national tour promoter" is a promoter that procures and promotes a tour across the entire country. (*Id.* ¶ 12.) In that situation, a concert promoter bids for the entire tour and pays the artist an up-front deposit or guarantee based on the number of concerts to be performed. The promoter also

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have submitted no evidence demonstrating that Mr. Rowe is an expert in the concert promotion business and when he speaks on matters beyond his personal knowledge, these statements are inadmissible under the Federal Rules of Evidence. *See* Fed.R.Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *see also* Fed.R.Civ.P. 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."). Accordingly, Joint 56.1 Statement ¶ 9 is considered as if undisputed.

[18] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 10 is considered as if undisputed.

makes other payments based on the success of the individual concerts or the aggregated success of the individual concerts, a collateralized tour. (Gonzalez Report, in J.A., Vol. I, ¶ 10(a), (b).) The "national tour promoter" has exclusive rights to the artist's concert performances and may negotiate for specific concerts with "local promoters" instead of the artist or the agent. (*Id.*) In some cases, the "local promoter" will pay a guarantee versus a certain percentage of the profits of the concert, and in others, the "local promoter" is paid a flat fee. (*Id.*) The artist generally maintains the right to approve each "local promoter" and the terms granted that promoter. (*Id.*) Some artists have also chosen to contact a national tour promoter directly without using a booking agency, thereby avoiding the agency's commission. (Joint 56.1 Stmt. ¶ 13.)

3. *Genres of Music*

Within the music industry, distinct genres of music are directed at different audiences. The Amended Complaint relates to contemporary music, which includes urban music (R & B, hip-hop and rap), pop music and rock music, but not Latin, Christian, gospel, or country and western. (*Id.* ¶ 15.) Additionally, the Amended Complaint refers to certain genres of music as "black music" and other genres of music as "white music." (*Id.* ¶ 14.) Promoters may specialize in a particular field of music. (*Id.* ¶ 16.)[19] Plaintiffs have specialized in R & B or "urban music," not pop or rock. (*Id.* ¶ 17.)[20] Booking

[19] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 16 is considered as if undisputed.

[20] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 17 is considered as if undisputed. The Court does not rely on Defendants' citation to the Billboard Magazine article, "Black Promoters Say They're Excluded From Top R & B Gigs." Under the Federal

agents at the Defendant Booking Agencies may specialize in a particular genre of music. (*See* Decl. of Cara Lewis, dated Feb. 27, 2003, ("Lewis Decl."), ¶ 3.)

4. *The Bidding Process*

To obtain an act, a promoter must first make an offer. (Joint 56.1 Stmt. ¶ 18.)[21] To ensure that they participate in the bidding process, concert promoters " 'have to keep a line of communication with the agencies' " to know which artists are planning to tour. (*Id.* ¶ 19 (quoting Rowe Dep., in J.A., Vol. VI, at 114).)[22] The most important aspect of promoting is " 'to be up on the situation about who is coming, what artist is coming out, and to try to be a part of the bidding process.' " (*Id.* (quoting Rowe Dep., in J.A., Vol. VI, at 115).)

The evidence shows that the booking agencies are not the only sources of information about artists' plans to go on concert tours. There are a variety of sources which promoters use to learn whether an artist is going on tour, "including rumor, internet websites, television, periodicals, contact with other promoters and booking agents, contacts with record companies and radio [station] executives." (*Id.* ¶ 20.)[23] If a particular act interests a promoter, the promoter must call the booking agent to

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Rules of Evidence, the article is inadmissible hearsay to prove the truth of the statements contained in it.

[21] Plaintiffs' reply relies on conclusory remarks and statements not based on personal knowledge; Joint 56.1 Statement ¶ 18 is considered as if undisputed.

[22] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 19 is considered as if undisputed.

[23] Plaintiffs' reply is non-responsive and admits the facts asserted in Defendants' statement; Joint 56.1 Statement ¶ 20 is considered as if undisputed.

express that interest and to inquire about specific dates and the artist's availability to perform in certain areas. (*Id.* ¶ 21.)[24] Additionally, the artists, whose concerts are the subject of the Plaintiffs' complaint, have managers whose names and addresses are available in Pollstar directories. (*See* Dep. of Jonathan Edward Stoll, dated Apr. 10, 2002 ("Stoll Dep."), in J.A., Vol. VI, at 87 (noting that Amusement Business and Pollstar publish guides on artists' representation).)

When seeking promotion opportunities, promoters must be proactive and assertive and cannot wait for agents to contact them. (Joint 56.1 Stmt. ¶ 22.)[25] Successful black concert promoters testify that they are proactive and aggressive in searching out concert opportunities, not only by calling agents, but also by calling the artists' recording studios and managers. (*See* Dep. of Al Haymon, dated Nov. 11, 2002 ("Haymon Dep."), in J.A., Vol. IV, at 211-13; Dep. of Jerome Williams, dated Apr. 30, 2002 ("Williams Dep."), in J.A., Vol. VI, at 39-40; Dep. of Daryll Brooks, dated Apr. 12, 2002 ("Brooks Dep."), in J.A., Vol. III, at 78-79; Dep. of Larry Bailey, dated Dec. 7, 2001 ("L. Bailey Dep."), in J.A., Vol. III, at 32-33; *see also* Stoll Dep., in J.A., Vol. VI, at 87.)[26]

At times, an agent may call a promoter with whom the artist, the manager, or the agent has a prior relationship to notify the promoter of an artist's plans to tour, but agencies do not contact all promoters, regardless of the

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[24] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 21 is considered as if undisputed.

[25] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 22 is considered as if undisputed.

[26] Other promoters testify that they have been aggressive and proactive in seeking out promotion opportunities. (Dep. of Brandon Phillips, dated June 19, 2002 ("Phillips Dep."), in J.A., Vol. V, at 168.)

race of the promoter, to inform them of every artist's tour. (Joint 56.1 Stmt. ¶23.)[27] The Booking Agency Defendants assert that they do not give advance notice to the Promoter Defendants of every tour of every major white artist. (*Id.* ¶24;[28] *see also* Dep. of Robert Light, dated Dec. 18, 2001 ("Light Dep."), in J.A., Vol. V, at 353 (stating CAA "didn't give any advance notice necessarily to black promoters" or other promoter groups in connection with a particular music tour.) The Independent Promoters Association, whose members are white, is rarely solicited by an agent or manager to submit an offer for a tour or a concert. (Dep. of Ben Liss, dated June 17, 2003 ("Liss Dep."), in J.A., Vol. V, at 129-130.) The evidence submitted in this case gives no indication that one promoter can prevent another promoter from submitting an offer or a bid to the agencies for a concert promotion opportunity.[29] (Haymon Dep., McCabe Decl. Ex. 11, at 48-49, 189-90, 252, 438.)

5. The Elements of a Bid

Although a promoter may discuss the terms of his bid over the telephone with a booking agent, the bid must

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[27] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶23 is considered as if undisputed.

[28] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶24 is considered as if undisputed.

[29] To the contrary, Alan Haymon, a successful black promoter, testified that "there is no barrier to submitting an offer that exists in our business" and that "it is impossible to my knowledge for anyone to prevent anyone from submitting a bid." (Haymon Dep., McCabe Decl. Ex. 11, at 189, 252.) In general, bids are submitted directly from the promoter to an agency. For this process, "you don't have to have anything other than a telephone and a fax machine ." (*Id.* at 48-49.)

eventually be in writing. (Joint 56.1 Stmt. ¶25.)[30] An artist or manager will only consider a bid when it is in writing and includes the amount of the guarantee, artist/promoter split and other information that is necessary for the artist or manager to assess the relative value of the bid. This information includes production costs, the cost of the building, participation in any ancillary revenue (such as merchandising or concessions) and projected costs for stagehands, rigging, limousines, catering and advertising. (*Id.* ¶26.)[31] Without this information, the manager will not be able to assess the offer. (*Id.*)

The artist's guarantee is the amount of money the promoter agrees to pay the artist for a particular performance. (*Id.* ¶27.) This guarantee is the minimum payment to the artist, who can negotiate a guarantee versus a percentage of the net receipts and, thus, earn more than the guarantee on a successful show. (*Id.* ¶28.) Many major artists rely on the percentage, also referred to as the "back-end split," to receive earnings substantially greater than the guarantee. (*Id.*) When promoters determine what guarantee to offer, they consider expected ticket sales and prices, expected expenses for the concert, and the amount the artist generally expects. (*Id.* ¶29.)[32]

After the agent receives a written bid from a promoter, the agent forwards the bid to the artist or the artist's

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[30] Plaintiffs' reply is non-responsive and cites to inadmissible evidence; Joint 56.1 Statement ¶25 is considered as if undisputed.

[31] Plaintiffs' reply is non-responsive and cites to inadmissible evidence; Joint 56.1 Statement ¶26 is considered as if undisputed.

[32] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶29 is considered as if undisputed.

management for consideration. (*Id.* ¶30.)[33] The artist then chooses whether to accept or reject the offer. (*Id.* ¶31.)[34] If the artist rejects the offer, the promoter then decides whether to submit a revised offer attempting to meet the artist's criteria. (*Id.* ¶32.)

The artist has the ultimate authority to accept or reject an offer by a concert promoter. (*Id.* ¶33.)[35] The artist may not make the decision itself, but may rely on the artist's manager or the booking agent to choose a promoter. (*Id.* ¶34 ("Artists handle decisions with respect to the selection of concert promoters in different ways.").)[36]

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[33] Plaintiffs' reply admits the facts in question and relies on statements not shown to be based on personal knowledge; Joint 56.1 Statement ¶30 is considered as if undisputed.

[34] Plaintiffs' reply admits the facts in question and relies on statements not shown to be based on personal knowledge; Joint 56.1 Statement ¶31 is considered as if undisputed.

[35] Plaintiffs' reply relies on statements not shown to be based on personal knowledge; Joint 56.1 Statement ¶33 is considered as if undisputed.

[36] Plaintiffs' reply misuses the King deposition, using it for a proposition it does not support. (*See* Pls.' Am. Joint 56.1 Stmt. ¶34; King Dep., in J.A., Vol. V, at 293 (agreeing that the artist, manager, or the booking agent can make the decision of which concert promoter to use).) Joint Statement ¶34 is considered as if undisputed.

Witnesses from non-party booking agencies and artist managers state that the artists and the artists' managers make the decision. (Dep. of Phil Casey, dated May 22, 2002 ("Casey Dep."), in J.A., Vol. III, at 77-78 (stating that the decision about what promoter will promote a particular event is made by either the artist or the manager in consultation with the artist, but not by the agent); Phillips Dep., in J.A., Vol. V, at 103 (explaining that as manager for Rod Stewart, Mr. Phillips and a partner made the final decision on which concert promoters to use); Weisner Dep., in J.A., Vol. VI, at 8, 12, 26-27, 29 (stating that in Mr. Weisner's fifteen to seventeen years as a manager for acts such as The Jacksons,

6. *Selecting a Concert Promoter*

Artists and artists' managers consider a variety of factors when selecting a concert promoter. (*Id.* ¶41 (stating

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Michael Jackson, Madonna, Earth Wind & Fire, Gladys Knight & the Pips, Steve Winwood and John Mellencamp, decisions about promoters have always been made by the manager and the artist—never the agent); Dep. of William Brown, dated Apr. 25, 2002 ("Brown Dep."), in J.A., Vol. III, at 23-29 (stating that as manager for Jill Scott and others, Mr. Brown makes the decisions with respect to the selection of concert promoters and that WMA sends all offers to him without recommendation and he then selects the promoter); Aff. of Irving Azoff, dated Dec. 15, 2000 ("Azoff Aff."), attached as Ex. 1 to Decl. of Peter Grosslight, dated Feb. 27, 2003 ("Gross-light Decl. I"), ¶¶ 2, 5 (stating, when he was the manager of the Eagles, Steely Dan, Journey and others, "[he was] directly involved in the organization of concert tours and the selection of concert promoters to promote [his] clients' tours and concert engagements. Once a tour has been planned, it [was] common for both [he] and the artists [he] represent[ed] to state preferences for particular concert promoters depending upon the local market place for each concert. . . . The final decision as to the acceptance of a particular concert promoter's offer [was] made by [him] and the artist.").)

Many black promoters agree that the artists and artists' managers make the final decision on the selection of the promoter. (Dep. of Lionel Bea, dated Apr. 26, 2002 ("Bea Dep."), in J.A., Vol. III, at 24 (stating that the manager might discuss promoter selection with the artist or the agent, but then the manager and artist make a decision and tell the agent which promoter they want to use); Brooks Dep., in J.A., Vol. III, at 43-44 (stating that decisions as to what vendors or promoters to work with are made by the artist or the manager); Dep. of Fredrick Luster, dated May 6, 2002 ("Luster Dep."), in J.A., Vol. V, at 74-75 (stating that managers and artists choose whether to use a certain promoter or play a certain market); Dep. of William Sparks, dated Mar. 13, 2002 ("Sparks Dep."), in J.A., Vol. VI, at 129-130 (stating that managers have the final word and are "absolutely" the ones who pick the promoters and that it's always been that way); Haymon Dep., in J.A., Vol. IV, at 44-45 (agreeing that some artists decide themselves who their concert promoters will be, while some artists rely on their manager to be the primary decision-maker).) Some promoters are of the opinion that the booking agent may influence the selection of a concert promoter. (King Dep., in J.A., Vol. V,

factors include the promoter's "(a) experience with a genre of music; (b) relationship with the artist; (c) relationship with the manager; (d) financial wherewithal; (e) relationships within a particular market or region; (f) reputation; (g) production infrastructure; and (h) relationship with the agency");[37] *see also* Rowe Dep., in J.A., Vol. VI, at 1234-35, 1237-38 (stating factors he would consider in selecting a co-promoter include familiarity with local area, ability of promoter, length of time in the business and previous shows promoted).)

In selecting a concert promoter, the promoter's relationship and track record with the artist are considered. (*See* L. Bailey Dep., in J.A., Vol. III, at 28, 30.) There is a preference for promoters who have worked with the artist in the past. (*See* Casey Dep., in J.A., Vol. III, at 128, 139; Dep. of Bruce Kapp, dated Mar. 1, 2002 ("Kapp Dep."), in Dep. Tr. Exs. to Pls. Opp'n to CAA's Summ. J. Mot., undated (received May 5, 2003) ("Pls.' CAA Dep. Tr."), Vol. I, at 94; Weisner Dep., in J.A., Vol. VI, at 12-13 .) Relationships and past experience with

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at 293 (stating that in some instances, agents may be a part of the selection process); Dep. of Jesse Boseman, dated Aug. 7, 2001 ("Boseman Dep."), in J.A., Vol. III, at 775-776 (stating that the decision on which promoter to use may be made by a "combination" of people, including the artist, his or her manager and the agent); Haymon Dep., in J.A., Vol. IV, at 44-45 (stating that some artists are influenced by their agent or family members).) Non-defendant booking agencies and artists acknowledge that the agents' recommendations are often influential. (*See* Casey Dep., in J.A., Vol. III, at 346 ("On a scale of 1-to-10, ... [the influence of the agent's recommendation is] probably in the 7 range."). Plaintiffs cite Mr. Cosby's deposition on page fifty-three, stating he "testified that his agency, [WMA], selected 90% of his promoters" (Pls.' Am Joint 56.1 Stmt. ¶ 37), but the Court could not find this page of Mr. Cosby's deposition in the excerpts submitted to the Court.

[37] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 41 is considered as if undisputed.

managers is also important in the selection of a concert promoter. (Luster Dep., in J.A., Vol. V, at 73-74; Light Dep., in J.A., Vol. V, at 515.) When agencies are asked to recommend a promoter, the promoter's relationship with the agency is also relevant. (Casey Dep., in J.A., Vol. III, at 139.) Similarly, when a promoter seeks to retain a co-promoter, the promoter's relationship with the co-promoter can be very important. (*See* Rowe Dep., in J.A., Vol. VI, at 1234-1235; Haymon Dep., in J.A., Vol. IV, at 251.)

A promoter's relationships within a market, e.g., with advertisers, venues or other suppliers, is another consideration in selecting a concert promoter. (*See* Casey Dep., in J.A., Vol. III, at 120; Weisner Dep., in J.A., Vol. VI, at 13 (considering important factors to include "relationships with the local people, [and] financially, to be able to support and advertise and promote the individual dates").)

In addition to the personal relationships discussed above, the promoter's past experience and reputation in terms of venue, genre and financial stability are also relevant. A promoter's experience and familiarity with a specific genre of music is important in selecting a concert promoter. (Casey Dep., in J.A., Vol. III, at 119 ("We look for someone who understands the type of the music that the artist performs."); *see also id.* at 125 (stating that he would not look for a promoter who did Christian promotion to promote a rock and roll show because "[t]hat promoter may not be able to focus his advertising on a target demographic").) Additionally, a promoter with familiarity in a specific geographic area or venue is preferred. (*Id.* at 119-20 (stating that "we look for someone with a familiarity of the city or marketplace where they are promoting in"); Haymon Dep., in J.A., Vol. IV, at 217).)

A promoter's financial capabilities are also crucial. (Casey Dep., in J.A., Vol. III, at 120; Phillips Dep., in J.A., Vol. V, at 103-04 (stating that biggest issue in choosing a concert promoter is whether the promoter is financially sound); Weisner Dep., in J.A., Vol. VI, at 13 (stating that when choosing a promoter, he considers, among other things, a promoter's financial ability "to be able to support and advertise and promote the individual dates").) A promoter cannot rely on ticket sales to cover financial obligations (Bea Dep., in J.A., Vol. III, at 21), but rather needs to be able "to not only promote the show, but in event of a loss, to sustain that loss without the show going sideways or canceling" (Casey Dep., in J.A., Vol. III, at 120). In that vein, a good credit history and professional reputation are important to assure an artist and the artist's manager of the promoter's financial stability. (L. Bailey Dep., in J.A., Vol. III, at 32-33; Bea Dep., in J.A. Vol. III, at 23.)

II. STANDARD OF REVIEW

A. *Summary Judgment Standard*

1. *General Standard*

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is granted summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The summary judgment standard is "well-settled" in the Second Circuit. *Marvel Characters, Inc. v. Simon,* 310 F.3d 280, 285 (2d Cir.2002). The Second Circuit holds:

> The party seeking summary judgment has the burden to demonstrate that no genuine issue of material fact exists. In determining whether a genuine issue of material fact exists, a court must examine the evidence in the light most favorable to, and draw all inferences in favor of, the non-movant. . . . Summary judgment is improper if there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party.

Id. at 286 (citations omitted).

However, as the Supreme Court has highlighted, "the issue of fact must be 'genuine.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* The non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleading," but must set forth "specific facts showing that there is a genuine issue for trial." Fed. Rule Civ. Proc. 56(e). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita,* 475 U.S. at 587 (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

B. *The Antitrust Standard*

Plaintiffs argue that the Defendants have committed a per se violation of section 1 of the Sherman Act because they have " 'divided the markets into territories' " and, "as a group, 'refuses to deal with a competitor,' " like Plaintiffs. (Pls.' Mem. Opp'n Booking Agency Defs.' Joint Mot. for Summ. J., dated Apr. 24, 2003 ("Pls.' Joint Mem."), at 33 (citing *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211-12 (1959).) In

Klor's, the plaintiff retail store alleged a group boycott and a refusal by defendant manufacturers to sell major household appliances to the plaintiff to the advantage of its competitor, defendant Broadway, which operated a chain of department stores, one of which competed with plaintiff. *Klor's,* 359 U.S. at 209. The defendants did not dispute this allegation, but rather sought summary judgment and dismissal of the complaint for failure to state a cause of action. (*Id.*) The lower court had dismissed the complaint as a "purely private quarrel . . . . which did not amount to a public wrong proscribed by the Sherman Act." *Id.* at 210 (internal quotations omitted). The Supreme Court reversed the lower court's dismissal of the complaint and remanded for trial because the allegations in the complaint plainly disclosed a concerted refusal to deal or group boycott in violation of the Sherman Act. *Id.* at 212.

This case concerns a motion for summary judgment, and Plaintiffs have presented no evidence of any refusal to deal, group boycott, or division of territory by the Defendants. *See infra* pp. 30-36. Instead, the evidence reveals a long-standing scarcity of bids for contemporary music concerts by Plaintiffs even when the Booking Agency Defendants requested bids from them during the last few years. *See infra* pp. 48-49, 52, 54-56, 59-60, 155-57, 162-65. Thus, this case cannot be treated as a per se violation of section 1 of the Sherman Act. Accordingly, the case is evaluated under the rule of reason, which states that "defendants' conduct will be deemed illegal only if it unreasonably restrained competition." *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.,* 386 F.3d 485, 506 (2d Cir.2004) (citing *Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 342 (1990)).

Under the rule of reason, a plaintiff bringing a private action under section 1 of the Sherman Act bears the "initial burden to demonstrate the defendant's challenged behavior 'had an *actual* adverse effect on competition as a whole in the relevant market.' " *Geneva Pharmaceuticals*, 386 F.3d at 506- 07 (quoting *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Ass'n. Inc.*, 996 F.2d 537, 543 (2d Cir.1993) (emphasis in original)). "[E]vidence that plaintiffs have been harmed as individual competitors will not suffice." *Id.* at 507 (citing *Atlantic Richfield*, 495 U.S. at 343-44). "The antitrust laws . . . . were enacted for 'the protection of competition not competitors.' " *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

After a plaintiff has established that there has been an actual adverse affect on competition as a whole, a plaintiff "must establish that there is a genuine issue of material fact as to whether [defendants] entered into an illegal conspiracy that caused [plaintiff] to suffer a cognizable injury."[38] *Matsushita*, 475 U.S. at 585-86 (citations omitted). A plaintiff must establish both that there is a conspiracy in violation of the antitrust laws and that the plaintiff suffered an injury resulting from the illegal conduct. *Id.* at 586. Specifically, a plaintiff must provide evidence, not speculation, that: "(1) there was an agree-

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[38] A claim under section 1 of the Sherman Act must be "commenced within four years after the cause of action has accrued." 15 U.S.C.A. 15b. "In the context of a continuing conspiracy to violate the antitrust laws, ... each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and . . . . as to those damages, the statute of limitations runs from the commission of the act." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971).

ment among . . . . [the defendants] in restraint of trade; (2) [the plaintiff was] injured as a direct and proximate result; and (3) its damages are capable of ascertainment and not speculative." *Vkk Corp. v. Nat'l Football League*, 244 F.3d 114, 131 (2d Cir.2001) (quotations and citations omitted).

In antitrust cases, courts have applied special standards to summary judgment motions due to their unique circumstances. Some courts have expressed reluctance to grant summary judgment motions in antitrust cases due to the complicated factual nature of their claims and the customary lack of explicit evidence of conspiracy. *See, e.g., H.L. Hayden Co. v. Siemens Med. Sys., Inc.*, 879 F .2d 1005, 1012 (2d Cir.1989) ("Summary judgment has traditionally been granted sparingly in antitrust cases. . . . because the claims 'so integrally involve motive and intent to conspire and injure.' " (citations omitted)). "Indeed, antitrust conspiracies are rarely evidenced by explicit agreements, but must almost always be proven by 'inferences that may be fairly drawn from the behavior of the alleged conspirators.' " *Id.* (citations omitted).

Although a court deciding a summary judgment motion must view the evidence in the light most favorable to the non-moving party and draw all inferences in its favor, "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita*, 475 U.S. at 588; *see also id.* at 594 (stating "mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect"). Thus, in order to withstand a summary judgment motion in an antitrust case, "plaintiffs must present evidence of an actual illegal combination, and such evidence must satisfactorily cast doubt on inferences of independent action or proper conduct by defendants." *Geneva Pharmaceuticals*, 386

F .3d at 507 (citing *Matsushita*, 475 U.S. at 588 (stating that these inferences must be reasonable "in light of the competing inferences of independent action or collusive action that could not have harmed [plaintiffs]")); *see also Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir.2002). Additionally, "courts should not permit factfinders to infer conspiracies when such inferences are implausible." *Matsushita*, 475 U.S. at 593. "[I]f the factual context renders [plaintiffs'] claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* at 587.

To survive a motion for summary judgment, a plaintiff seeking damages for a violation of section 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588.

III. ANTITRUST CLAIMS: SHERMAN ACT, 15 U.S.C. § 1

A. *Plaintiffs Have Failed to Present Evidence to Support Their Antitrust Claims*

1. *Plaintiffs Have Failed to Establish Antitrust Standing*

Plaintiffs have made a claim for damages and injunctive relief under section 1 of the Sherman Act, which states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or

commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S .C. § 1. The Amended Complaint alleges that the Defendants' market dominance "provides the promoter defendants and the booking agency defendants with the control and power, which they exercise, to purposefully exclude others, including plaintiffs, from competing in the concert industry." (Am.Compl.¶ 74.) The Amended Complaint asserts that the conspiracy has an "anticompetitive effect upon interstate trade and commerce" because it "eliminates competition among promoters and prevents concerts from being promoted at lower prices which would benefit the artists and public." (*Id.* ¶ 78; *see also id.* ¶ 80 (stating that "[i]f plaintiffs were permitted to compete with defendant promoters for the promotion of concerts given by major acts, white and black promoters' fees would decrease. . . . Reduced promoter fees would benefit the public through lower ticket prices, or artists, through greater net revenues, or both").)[39]

To determine whether a market injury exists for standing under the Sherman Act, a plaintiff must first define the relevant market and provide some evidence supporting the definition. *Pepsico,* 315 F.3d at 105; *see, e.g., Ezekwo v. Am. Bd. of Internal Med.,* 18 F.Supp.2d 271, 278 (S.D.N.Y.1998). The relevant market for § 1 purposes must be for all contemporary music concerts that are "reasonably interchangeable" in use for con-

[39] Plaintiffs also claim that this conspiracy creates a "negative ripple effect throughout the black community" because white promoters "rarely retain the services of black-owned businesses servicing concerts." (Am.Compl.¶ 83.) This allegation is not relevant to the determination of whether there is actual injury to competition in the relevant market under § 1. Additionally, Plaintiffs have provided no evidence relating to the use of black-owned businesses by white or black concert promoters.

sumers. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *see also Pepsico*, 315 F.3d at 105.

The Amended Complaint alleges that the Defendants have market dominance in the market of live contemporary music concerts in venues with more than 3,000 seats throughout the United States (Am.Compl.¶¶65, 78) and that, for live concerts of contemporary music, the "entire United States is a single national market wherein promoters compete for the rights to obtain contracts to promote concerts" (*id.* ¶58). Plaintiffs also allege that "there are local regional markets, generally incorporating the metropolitan areas surrounding each major city, for the promotion of concerts within each such region." (*Id.*)

Plaintiffs have offered no evidence to show that the alleged relevant product market for contemporary music concert promotions in venues with 3,000 or more seats is not reasonably interchangeable with concerts conducted in smaller venues. Thus, Plaintiffs have not provided any evidence to support their relevant market definition.

Even assuming there is a distinct market for contemporary concert promotions in the United States in venues with 3,000 or more seats, Plaintiffs have not provided evidence to support their allegation that the Booking Agency Defendants and the Promoter Defendants have control and power over that market. Plaintiffs rely on an extrapolation made by Plaintiffs' former counsel from Pollstar Magazine[40] data for the period from June 1998 to May 1999 for the claim that the total market share of the Booking Agency Defendants named in the Amended Complaint and *uncharged* booking agency co-conspira-

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[40] Pollstar Magazine is the "weekly industry periodical reporting concert and tour information." (Am.Compl.¶65.)

tors was 71%, or 1,630 of the major concerts.[41] (*Id.* ¶71.) Plaintiffs state that: WMA artists gave approximately 11% of the major concerts; CAA artists gave approximately 26.4% of the major concerts; and Renaissance artists gave less than 4% of the music concerts. (*Id.*) Based on these calculations, the present Booking Agency Defendants together account for less than 42% of the concerts performed in the alleged market. Beaver and Jam, the only remaining Promoter Defendants,[42] are alleged to have engaged in, respectively, the promotion or co-promotion of 73(3%), and of 111 (4.5%) of the 2460 major concerts in Plaintiffs' test period.[43] (*Id.* ¶67.)

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[41] Defendants' expert, Dr. Williams, however, shows in Exhibit 7 to his expert report that "acts represented by non-defendant booking agencies performed 54 percent of all shows performed [at such venues] during 1993-2000." (Williams Report, in J.A., Vol. I, ¶31, Ex. 7.) Exhibit 7 shows also that "major acts represented by non-defendant booking agencies performed 40 percent of the shows performed by all major acts during 1993- 2000." (*Id.*)

[42] Most of the Promoter Defendants have been dismissed from the case or were acquired by SFX and, pursuant to agreement with Plaintiffs, the claims against them have been dismissed with prejudice. Although the Sherman Act claim against Jam was dismissed with prejudice by the Court, Plaintiffs were granted leave to amend the Amended Complaint pursuant to Rule 15(a) of the Federal Rules of Procedure, if during discovery they found evidence to support the dismissed claim and could make a showing that there was sufficient evidence to proceed with the claim. *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, No. 98 Civ. 8272(RPP), 2000 WL 896929 (S.D.N.Y. June 30, 2000)). Plaintiffs have not sought leave to amend the Amended Complaint. However, because Plaintiffs' arguments seem to assume that their antitrust claims against Jam are valid, the Court will address the lack of evidence against Jam on Plaintiffs' antitrust claims.

[43] In the test period, there were 2,460 such concerts of which Plaintiffs claim 1,625 or 65% were concerts promoted or co-promoted

The extrapolation by Plaintiffs' former counsel is cited in the Amended Complaint but is not offered in evidence or supported by expert testimony. Thus, there is not evidence to support Plaintiffs' claim of Defendants' control of the market for contemporary music concerts in the United States in venues with 3,000 or more seats.[44] Plaintiffs provide no other evidence to support their claim of market control.[45] Thus, Plaintiffs have

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by the originally named promoter defendants or *uncharged* promoter co-conspirators. (Am.Compl.¶¶66-67.) However, Exhibit 6 of Dr. Williams's expert report shows that "non-defendant promoters promoted 72 percent of all shows and 58 percent of shows by major acts during the 1993-2000 period." (Williams Report, in J.A., Vol. I, ¶31, Ex. 6.)

[44] Additionally, the Pollstar information is apparently incomplete as Mr. Haymon, a major concert promoter, testified he did not report his concert results to Pollstar. (Haymon Dep., in J.A., Vol. IV, at 38.)

[45] The statistics calculated from the Pollstar data by Plaintiffs' former counsel do not show that Beaver or Jam are dominant in the national market. Plaintiffs rely on the data from Pollstar to conclude that in the test period Beaver promoted 72% of the major concerts in New Orleans and 81% in Memphis and that Jam promoted 85% of the major concerts in Chicago and 74% in Minneapolis. (Pls.' Rev. Jam Mem. Ex. 3 (Dominant Promoter Table); *see also* Aff. of Christine Lepera, dated Jan. 19, 2001 ("Lepera Aff."), in Pls.' Beaver Ex. 10, ¶6.)

Additionally, Plaintiffs rely on Mr. Rowe's declaration to assert that Jam has dominated Chicago since the late 1970s or early 1980s (Aff. of Leonard Rowe, dated Feb. 27, 2003 ("Rowe Jam Aff. I"), Pls. Rev. Jam Ex. 1, ¶11) and that Beaver has been dominant in New Orleans since at least the early 1980s (Decl. of Leonard Rowe, dated Feb. 27, 2003 ("Rowe Beaver Decl."), Pls. Beaver Ex. 6, ¶9). Mr. Rowe is not an expert, and Plaintiffs have not presented evidence of his particular familiarity with these markets. His assertions are not shown to be within the scope of his personal knowledge or supported by other evidence.

(*footnote continued*)

offered insufficient evidence from which a reasonable juror could infer that the Booking Agency Defendants, or Beaver or Jam, either individually or by concerted action with others, have the market power to exclude Plaintiffs from promoting concerts in the contemporary music concert market in the United States, the market alleged in the Amended Complaint.

Even assuming that Plaintiffs' alleged market serves as the relevant market and that the Defendants have power and control of that market, Plaintiffs have presented no evidence to support the claim that competition among promoters in that market has been eliminated, other than by former defendant SFX's acquisition during the pendency of this action of a number of former defendant concert promoters, against all of whom Plaintiffs have dismissed their claims. No evidence has been submitted showing a division of markets ~~by~~ the Promoter Defendants even though the Plaintiffs have had full discovery, including emails retrieved from the hard drives of the Defendants. Nor is there evidence that any Promoter or Booking Agency Defendant prevented the Plaintiffs, or anyone else, from submitting bids on concerts.

The Amended Complaint asserts that the alleged conspiracy among the Defendants "makes entry into the booking agency market far more difficult." (Am.Compl. ¶ 79.) Plaintiffs have not provided any evidence indicating that entry into the booking agency market is difficult. On the contrary, the evidence shows that one

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Because Plaintiffs have not presented any evidence raising an inference of any agreement among these allegedly dominant regional promoters and booking agencies, these claims of territorial dominance are irrelevant. Plaintiffs have not brought a section 2 claim under the Sherman Antitrust Act against any of the Defendants.

Booking Agency Defendant, Renaissance, entered the concert promotion market within a year prior to the filing of the complaint and was successful enough to attract top acts and be made a defendant in this action.[46]

Plaintiffs assert that there is an antitrust injury because the conspiracy prevents Plaintiffs from competing in the market, and if they were allowed to compete "concerts could profitably be promoted at rates of 5% of revenues, or even less," in contrast to the 15% of the net sales revenues they allege that Promoter Defendants currently receive. (*Id.* ¶80.) The Plaintiffs further allege that these reduced promoter fees "would benefit the public through lower ticket prices, or artists, through greater revenues, or both." (*Id.*) Not only have Plaintiffs provided no evidence to support this claim that concerts would be promoted at lower rates if they were "allowed" to compete,[47] Plaintiffs have not provided evidence

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[46] Defendant Renaissance, formed in 1996, entered the booking agency market with top acts in 1997. (Declaration of David Zedeck, dated Feb. 27, 2003 ("Zedeck Decl. I"), ¶2.) Plaintiffs do not dispute Renaissance's entry with top acts or approximate date of entry. Additionally, the expert report of Dr. Darrell Williams contains two other examples of "successful entrants" into the promotion market, one of which, Magic Johnson Productions, is owned by an African-American. (Williams Report, in J.A., Vol. I, ¶66; *see also* Decl. of Earvin Johnson, Jr. (Magic Johnson), dated May 27, 2002 ("E. Johnson Decl."), attached as Ex. 3 to McCabe Decl., ¶4.)

[47] In their Joint Memorandum, Plaintiffs cite the expert report of Dr. Gerald Jaynes to support the proposition that promotion costs could be 5% if competition existed. (Pls.' Joint Mem. at 14.) Dr. Jaynes's report, however, does not discuss whether promotion costs could be lowered. (Expert Report of Dr. Gerald Jaynes, dated July 31, 2002 ("Jaynes Report"), attached as Ex. 36 to Pls.' Joint Mem. Exs., Vol. II.) The Jaynes Report calculated damages to Plaintiffs from racial discrimination based on data, which was found to be unreliable, provided by Plaintiffs. (*Id.* at 5-7; *see also Rowe Entertainment, Inc.*

showing that any change in promoter fees would affect competition among promoters.

In short, no evidence has been presented to suggest market injury and, accordingly, antitrust standing has not been established.

2. *Plaintiffs Have Provided No Evidence of a Conspiracy in Restraint of Trade*

Even if the Plaintiffs could show an antitrust injury to the relevant market, their claim under § 1 would fail on the merits. Plaintiffs allege that the conspiracy "is conducted by defendants in order to benefit white promoters, particularly the promoter defendants, by eliminating black promoters as competitors, and to maintain a market for the promotion of concerts which can be controlled and ordered by the conspirators." (*Id.* ¶ 78.) The alleged conspiracy consists mainly of two purported agreements.[48] The Amended Complaint first alleges that

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v. The William Morris Agency, Inc., No. 98 Civ. 8272(RPP), 2003 WL 22124991 (S.D.N.Y. Sept. 15, 2003).) Dr. Jaynes also testified that he was offering no opinion on the alleged conspiracy's effect on competition. (Dep. of Professor Gerald Jaynes, dated Sept. 13, 2002 ("Jaynes Dep."), in J.A., Vol. IV, at 12, 15-16.)

Additionally, Defendants have presented the expert report of Dr. Williams to show that the total exclusion of the four plaintiffs would not have any impact on competition in the market. (William Report ¶ 45 (stating Plaintiffs constituted less than 0.3% of the combined market share during 1994 to 2001).)

[48] Plaintiffs also allege that as part of the conspiracy, the Promoter Defendants receive more favorable contract terms (Pls.' Joint Mem. at 8-9) and that Booking Agency Defendants gave the Plaintiffs inaccurate, misleading, and false information about different concerts and tours (*id.* at 11). These allegations are discussed in the discrimination section. Although the Promoter Defendants often receive more

"[a]s a part of the conspiracy, the promoter defendants are designated specific territories and venues, allowing them great dominance and control in these areas, to the exclusion of plaintiffs and others." (*Id.* ¶ 76.) Second, it states that the Booking Agency Defendants "assur[e] the promoter defendants that they will always be given the opportunity, to the exclusion of all others, of promoting the defendant booking agents' top acts in the promoter defendant's assigned territory, at highly profitable rates," in exchange for agreeing to promote lesser talents at possible loss.[49] (*Id.* ¶ 79.)

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favorable terms than those initially offered in contracts on booking agency forms, Defendants' have presented evidence supporting their contention that these favorable terms are the result of bargaining between the booking agencies and Promoter Defendants. *See infra* pp. 83-86, 104-07. Additionally, Promoter Defendants do not consistently receive these more favorable terms. *See infra* pp. 83-86, 104-07. This conduct is at least as consistent with permissible competition as with an illegal conspiracy and is insufficient standing alone to support an inference of an illegal conspiracy in restraint of trade. *See Matsushita*, 475 U.S. at 588.

[49] The Amended Complaint also alleges that Beaver, Jam and the Booking Agency Defendants committed specific overt acts in furtherance of the conspiracy. (Am. Compl. ¶ 87; *see also* Pls.' Joint Mem. at 4-6, 8-11, 24-26 (alleging overt acts involving an exclusive contract at Mud Island and certain concert tours of Janet Jackson, Kenny G, Toni Braxton, Maxwell, Lauryn Hill and Erykah Badu).) These specific overt acts are reviewed in the discrimination section. Plaintiffs have provided no evidence to support their claims that these alleged acts were in furtherance of any conspiracy in restraint of trade.

(i) The Alleged Territory Allocation Conspiracy

Plaintiffs assert that each of the dominant promoters is a member of a horizontal conspiracy to exclude Plaintiffs and restrain competition by honoring each others' market areas, which the Booking Agency Defendants also honor. (Hrg. Tr. 10/17/03 at 64-72.) The Amended Complaint sets forth the market areas each of the promoter defendants are allegedly designated to dominate. (Am.Compl.¶¶ 29-54.) Plaintiffs have submitted no evidence that supports the allegation that the promoter defendants are "designated" specific areas as opposed to being physically located in specific areas. Plaintiffs make their claims of dominance based on Plaintiffs' former counsels' extrapolation, not offered in evidence, which is based on Pollstar's published information for the period June 1998 through May 1999,[50] but offer no evidence, including inferential evidence, of the alleged horizontal conspiracy agreement between concert promoters named in the Amended Complaint to divide these markets. Review of the evidence Plaintiffs have offered follows.

Plaintiffs cite to the January 19, 2001, affidavit of Richard Johnson to support their claim that each of the current and former Promoter Defendants in the Amended Complaint has a territorial monopoly. (Pls.' Joint Mem. at 7.) Mr. Johnson was employed in the music division of Defendant WMA as a booking agent from 1982 to 1986, twelve years before the filing of this complaint, and has been employed in an unrelated economic area ever since. (R. Johnson Aff., Pls.' Beaver Ex 9, ¶ 1.) Mr. Johnson does not identify Beaver or Jam as the dominant

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[50] As stated *supra* p. 27, this extrapolation is not supported by expert testimony and apparently contains incomplete information.

promoters in any particular territory. Mr. Johnson states in his affidavit that the highly competitive industry described by the Defendants (in supporting their unsuccessful motion opposing the disclosure of certain documents on the grounds of exposure of trade secret information to competitors) simply did not exist. (*Id.* ¶ 3.) Mr. Johnson states:

> On the contrary, each major market in the United States was controlled *essentially* by one primary *or* dominant promoter, whose identity is well known among all the major booking agents. . . . When a white artist represented by WMA wanted to have a concert in one or more cities, or stage a nationwide tour, there was no competitive "bidding" process, in which WMA engaged in arms length bargaining with several promoters in each major venue in order to get the best deal for themselves and their artists. [The booking agents of WMA], who were also organized by territory, instead were instructed to book their artists through the dominant promoter in his or her market. Agents would *typically* not reach out to any promoter other than the one that controlled his respective territory, and if any unsolicited offer or bid came to an agent from a secondary promoter, it would *very likely* never leave his or her desk.

(*Id.* (emphasis added).)

Mr. Johnson's affidavit about WMA's practice of selecting primary or dominant promoters in each major city contains no evidence of the existence of an agreement among the "dominant concert promoters" to divide the market, to exclude competition, or to restrain trade in the United States. Nor does he state that WMA was party to an agreement with any concert promoter or booking agency to direct concerts to a single promoter in

a market area. Indeed, Mr. Johnson's knowledge is limited to WMA's procedures for booking agents for the period of 1982 to 1986 and to his personal knowledge of WMA's internal practices.[51] Mr. Johnson's affidavit does not demonstrate that he has knowledge of how other booking agencies, both defendants and non-defendants, selected concert promoters. Furthermore, little other evidence before the Court relates to the time period cited by Mr. Johnson.

Plaintiffs also cite to the testimony of Bruce Kapp, a SFX executive who is a former concert promoter at Pace and Magicworks, concerning the manner in which various promoters achieved dominance in particular markets as support for their claim of a horizontal conspiracy. (Hrg. Tr. 10/17/03 at 64-65.) Mr. Kapp testified that Bill Graham came to "dominate" the San Francisco market because he owned or had exclusive booking arrangements with specific venues. According to Mr. Kapp, Bill Graham "[b]uilt venues in San Francisco, the Philmore [sic], with his own money or partner's money, whatever; promoted and bought the shows—almost all the shows; took the risk; and same way that every other promoter did it" (Kapp Dep., Pls.' Joint Mem. Ex. 12, at 231-32); Larry Magid established his dominance in the Philadelphia market the same way that Bill Graham did in San Francisco (*id.* at 232-33); Don Law in Boston did simi-

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[51] Plaintiffs did not depose Mr. Johnson. He is not an expert witness designated pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure and his affidavit does not comply with the requirements of Rule 56(e) of the Federal Rules of Civil Procedure. It is accepted only insofar as the statements contained in it are based on his personal knowledge of actions taken by booking agents of WMA from 1982 to 1986. WMA operates out of offices in New York, California, and Tennessee. Mr. Johnson does not state which office he was in.

larly (*id.* at 235); and all these promoters probably dominated their markets by the mid 1980's" (*id.* at 236).

Similar to the testimony of Mr. Johnson, Mr. Kapp's testimony about the dominance promoters have over concert promotions in these cities contains no evidence of the existence of an agreement among the "dominant concert promoters" to exclude competition or restrain trade in the United States, as claimed in paragraphs 74 and 75 of the Amended Complaint. Nor does he assert that other promoters or booking agencies assisted these promoters in gaining their positions of dominance. Mr. Kapp's testimony is limited to his knowledge as a former concert promoter at Pace and Magicworks. Even accepting the proof of promoter dominance based on the Plaintiffs' counsel's statistical extrapolation and assuming Mr. Kapp could testify as an expert,[52] Mr. Kapp's testimony is that the alleged dominant promoters achieved dominance in the early 1980s by taking risks, buying almost all the shows and building venues. Mr. Kapp's testimony does not suggest any agreement between the Promoter Defendants to divide the market in the United States, nor does it suggest the Booking Agency Defendants agreed together or with any concert promoter that the market should be so divided. In fact, neither Defendant Renaissance nor Defendant CAA existed during the time period discussed by Mr. Kapp and by Mr. Johnson.

As evidence of the alleged conspiracy between the booking agencies and the dominant concert promoters, Plaintiffs cite two letters, dated February 25, 1998, and March 2, 1998, from a booking agent, WMA's agent Shelly Schultz, to Sherry Wasserman and Greg Perloff of

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[52] Mr. Kapp has also not been designated as an expert pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure.

Bill Graham Presents, a former promoter defendant.[53] (Pls.' Joint Mem. at 21 (citing Pls.' Joint Mem. Exs. 41, 42).) The February 25, 1998 letter attempts to persuade Wasserman and Perloff to promote Culture Club-Human League-Howard Jones concerts in Graham's "market" of the San Francisco Bay area. (*See* Am. Compl. ¶ 31.) Mr. Schultz states, "I thought I would never, ever think about moving into the Bay Area with another promoter. But then again, the winds are blowing and changes are happening. Don't mistake this for a threat. If you don't get it, there are others who do." (Pls.' Joint Mem. Ex. 41.) Earlier in the letter, he stated, "you need to understand that there are others who are chomping at the bit to move into your marketplace and want this show." (*Id.*) The March 2, 1998, letter reads in full as follows: "I am sorry you chose to ignore the Culture Club matter for the Bay area. This agency still has to do business. If the walls are down around the Bay area it's because you allowed that to happen . . . . with your friends no less."[54] (Pls.' Joint Mem. Ex. 42.)

There is also evidence in the record that shows that Mr. Schultz made efforts to get other promoters to promote Culture Club in the Bay Area. Mr. Schultz wrote Mr. Perloff on August 13, 1998, about the Culture Club concert stating, "I told you the whole package would be $50,000 and the purchaser provides local sound and lights to Artist specifications. This figure is for CULTURE CLUB and the support Artist. If that's not the

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[53] Plaintiffs have stipulated to dismiss their claims against Bill Graham Presents.

[54] At oral argument, Plaintiffs asserted that Bill Graham Presents finally booked the Culture Club concert. (Hrg. Tr. 10/17/03 at 70-71; *see also*, Pls.' WMA Ex. 181 (Memo from Lee Smith of Bill Graham Presents to Shelly Schultz of WMA, dated Oct. 5, 1998 (discussing postponement of Culture Club concert)).)

case, let me know. I have no problem using another promoter in the Bay Area." (Exs. to Pls.' Opp'n to WMA's Summ. J. Mot., undated (received May 5, 2003) ("Pls.' WMA Exs."), Ex. 151.) On August 14, 1998, Mr. Schultz of WMA wrote Mr. Vallon, a concert promoter from Los Angeles, stating "I feel very strongly about opening up the San Francisco marketplace to other promoters. Therefore, would you like to be considered for a Culture Club date plus support in the Bay area in October?" (Pls.' Hrg. Ex. 14.) In a letter dated August 18, 1998, Jeff Trisler of Universal makes an offer for a Culture Club concert at a venue in the Bay Area to Guy Richard of WMA and copies the letter to Mr. Schultz and Mr. Vallon. (Pls.' WMA Ex. 91.)

These letters allow the inference that Mr. Schultz of WMA may have favored Bill Graham Presents as a concert promoter in the Bay Area prior to February 1998. However, the correspondence on the Culture Club concert does not evidence: (1) an agreement among the Promoter Defendants; (2) an agreement between the Booking Agency Defendants; or (3) an agreement by WMA and Bill Graham Presents to exclude other promoters from Bill Graham's "market." The inference raised by Mr. Schultz's letter to Mr. Vallon, attempting to interest him in buying the promotion for a Culture Club concert in the Bay Area, is that Mr. Schultz had no agreement with Bill Graham Presents to exclude other promoters from that market.

The other evidence Plaintiffs point to for support of their claim of a territorial agreement is a letter dated May 22, 1996, from Rob Light of CAA to Mitch Slater of Delsener/Slater, a former promoter defendant,[55] stat-

[55] Plaintiffs have stipulated to dismiss their claims against Delsener/Slater.

ing, "You're always asking me to protect you in the market." (Pls.' Hrg. Ex. 17.) At most this letter shows that Delsener/Slater had asked CAA to give it a preference in the market. There is no showing of any agreement to any territorial arrangement.

In addition, Plaintiffs' exhibits contradict their claims of a horizontal agreement to divide markets. Those exhibits include contracts between the Booking Agency Defendants and alleged dominant concert promoters in cities where the Amended Complaint asserts that another concert promoter is dominant. (*See e.g.*, Pls.' Joint Mem. Ex. E.)[56] In the face of evidence showing that the artists

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[56] For example, Exhibit E to Plaintiffs' Joint Memorandum contains artists' contracts with Beaver (New Orleans) on Defendant CCA's form contract for concerts in: (1) Fort Worth and Dallas, Texas (Pace Concerts) (Am. Compl. ¶51 (stating that Pace Concerts is the "dominant concert promoter is Texas")); (2) St. Louis (Contemporary Productions) (*id.* ¶42 ("Contemporary Productions is the predominant concert promoter operating in the region surrounding St. Louis. . . .")); (3) Worcester, Massachusetts, and Portland, Maine (Don Law Productions) (*id.* ¶45 ("Don Law Company is the predominant concert promoter in the New England region. . . .")); (4) Nassau Coliseum in Uniondale, New York (Delsener-Slater) (*id.* ¶43 ("Delsener/Slater Enterprises is the predominant concert promotion company operating in the New York City metropolitan area . . . .")); and (5) Atlanta, Georgia (Concert/Southern Promotions) (*id.* ¶41 ("Concert/Southern Promotions is concert promoter, operating primarily in the Southeastern United States. . . .")). Also Exhibit 12 to Plaintiffs' Joint is an artist contract with Beaver Productions on a WMA contract form for a concert in St. Louis, Missouri (Contemporary Productions) (*id.* ¶42). Furthermore, Exhibit 9 of Plaintiffs' Hearing Exhibits contains an artist contract with Beaver on CAA's contract form for a concert in Houston, Texas (Pace) (*id.* ¶51).

Also, Mr. Kapp testified that to his knowledge Jam Productions promoted concerts in San Francisco (Bill Graham Enterprises) (*id.* ¶31 ("Bill Graham Enterprises is the predominant concert promoter in the San Francisco Bay/Northern California area.")). Philadelphia (Electric Factory) (*id.* at ¶46 (stating that Electric Factory "is the predominant con-

represented by the Booking Agency Defendants contract with other concert promoters for concerts in the "designated markets" of the alleged dominant concert promoters, Plaintiffs' claim of an agreement between the Booking Agency Defendants and the Promoter Defendants to restrain trade in the designated areas throughout the United States is too implausible to be inferred by the trier of fact.[57] *See Matsushita*, 475 U.S. at 593.

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cert promoter in Philadelphia, Pennsylvania.")) and Boston (Don Law) (*id.* ¶45). (Kapp Dep., Pls.' CAA Dep. Tr., Vol. I, at 238-41) Mr. Leff testified that Beaver promoted concerts in Memphis, Mid-South Concerts' territory, prior to 1998. (Leff Dep., Pls.' Beaver Ex. 4, at 56.) Exhibit A to the affidavit of Don Fox, dated March 13, 2003 ("Fox Aff."), (which is attached as Exhibit 2 to Beaver's Reply Memorandum.) shows that alleged dominant promoters Pace Concerts (Texas), Contemporary Productions (St.Louis), and Cellar Door promoted concerts in New Orleans, Lakefront Arena, Beaver's area. (*See also* Beaver's Reply Mem. in Support of Mot. for Summ. J., dated Mar. 13, 2003 ("Beaver Reply Mem."), at 9.) In view of these examples, the Court will not set forth all the other contracts Plaintiffs offered as exhibits on this motion which are additional evidence of no horizontal conspiracy to divide markets between the Promoter Defendants.

[57] There is evidence that WMA and CAA have contacted "dominant promoters," as much as a year in advance, asking them to hold venues on specific dates for artists whose tours they are planning. (Pls.' Hrg. Ex. 8.) These venue holds are obviously competitive attempts to preempt other booking agencies, and promoters in contact with them, from putting holds on the desired venue on the same date for other artists, and are not supportive of the Plaintiffs' antitrust claims as they reflect competition among booking agencies. *Matsushita*, 475 U.S. at 588 ("[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.") These venue holds are not proof of the Plaintiffs' claim of a horizontal conspiracy among the concert Promoter Defendants to divide the U.S. market or evidence from which a reasonable jury could find that the Booking Agency Defendants are members of a conspiracy with all the concert Promoter Defendants to exclude Plaintiffs from the concert promotion

(ii) The Alleged Reciprocal Agreement

The Amended Complaint asserts that:

> [t]he booking agency defendants are able to maintain ultimate control over the concert promotion market, and guarantee promotion of all their acts, including the less successful ones, by *assuring* the promoter defendants that they will always be given the opportunity, to the exclusion of all others, of promoting the defendant booking agents' top acts in the promoter defendant's assigned territory, at highly profitable rates.[58] In exchange for this lucrative, anti-competitive agreement, the booking agency defendants are able to *assure* artists that the promoter defendants will guarantee the sale of tickets for concerts given by less successful acts on the booking agency defendants' talent rosters.

(*Id.* ¶ 79 (emphasis added).)

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business throughout the United States or to restrain competition in that market.

[58] Plaintiffs' allegation assumes that the Booking Agency Defendants not only have the ability to make, but also to keep these "assurances" to Promoter Defendants. The record is clear and unambiguous that the artist or the artist's manager enters into a contract with the concert promoter for a concert at a specified venue, generally for a guaranteed amount and an artist/promoter split of gross revenues after deducting specified expenses. The booking agency is not a party to the contract, although the contract is generally on the booking agency's form. Accordingly, a contract's terms are not determinative of the terms of any agreement between the promoters and the booking agency. Booking agencies are only agents of the artists. The booking agency, on instructions from the artist or the artist's manager, arranges the routing of an artist's tour and the venue of each appearance and may state on behalf of the artist the terms of the concert contract with the promoters.

Although Plaintiffs have had complete discovery of the Defendants' files, including email and hard drive discovery, Plaintiffs have offered no evidence showing that any Booking Agency Defendant has made any assurance to any Promoter Defendant that it will have exclusive access to that booking agency's top acts. Nor have Plaintiffs have offered evidence of any assurance to any artist that a Promoter Defendant will guarantee the sale of tickets for concerts of less successful acts.

Additionally, Plaintiffs have failed to present evidence to show that the Booking Agency Defendants and Promoter Defendants have an economic rationale to participate in this alleged exchange, even considering the alleged "interrelated and interdependent conduct." (*Id.* ¶ 81.) Plaintiffs allege that:

> [i]n furtherance of the conspiracy, all of the booking agency defendants are willing to forego the enhanced compensation they would receive from major artists through reduced promoter fees which would result from unrestrained competition, although it is apparently against their economic self-interest. This is because the conspiracy ensures that all of their acts, including their less stellar acts, will be accepted and promoted by the promoter defendants within each of their geographically allocated territories. The promoter defendants are uniformly willing to promote the lesser acts in exchange for promoting the successful acts and for their continuing dominant presence in their assigned geographic territories. The acts of all of the defendants are thus interrelated and interdependent, and the success of the conspiracy depends upon all of the defendants consciously pursuing the identical parallel conduct, which they have done.

(*Id.*)

As to the Booking Agency Defendants, Plaintiffs have failed to offer evidence that any Booking Agency Defendant has been willing to forego this enhanced compensation. Additionally, Defendants provide expert evidence by Dr. Williams, who states that due to competitive factors, the Booking Agency Defendants could never recoup their losses from agreements such as the one described by the Plaintiffs. (Williams Report, J.A., Vol. I, ¶¶ 16-22, Exs. 1, 1a, 1b.) Furthermore, such an agreement could result in the booking agency's client, the artist, not receiving the most lucrative concert contract with a resulting loss of income to the artist and to the Booking Agency Defendant. According to Dr. Williams's report, competition between the booking agencies is intense, and artists often switch to other booking agencies. (*Id.* ¶¶ 26-29.) Thus, the alleged conspiracy would be against the economic interest of the Booking Agency Defendants because artists who were not receiving competitive contractual terms would switch to another agency.

As to the Promoter Defendants, Plaintiffs have failed to offer evidence to support their allegation that the Promoter Defendants promote lesser acts in exchange for the promotion of successful acts and territorial dominance. Again, Plaintiffs rely on Mr. Johnson's affidavit, which states that:

> WMA's interest in giving as much lucrative business as possible to the same promoter ensured that the promoter would also promote less prominent (but potentially more promising) acts.

(R. Johnson Aff., Pls.' Beaver Ex. 9, ¶ 4.)

Mr. Johnson does not state that WMA artists agreed, or that WMA caused them to agree, to less favorable financial terms for a concert if the promoter agreed to

promote less prominent acts. (*Id* .) Mr. Johnson only states that WMA recognized that a concert promoter benefiting from receiving prominent acts for promotion would be more willing to promote less prominent acts. (*Id.*) This testimony, while evidence of a business practice by WMA in 1986, well prior to the limitations period, does not show any "agreement" by WMA with any of the Promoter Defendants to restrain trade in the United States, which is the claim in the Amended Complaint. Nor does it show any agreement among the concert promoters to restrain trade in the contemporary music concert promotion market in the United States as alleged in the Amended Complaint and restated at oral argument.

Plaintiffs also rely on the deposition testimony of Mr. Kapp, in which he stated that when he was in the concert promotion business, promoters "promoted acts they otherwise would not want to promote, in the hope or expectation that they would obtain other acts from [the booking] agencies" (Kapp Dep., Pls.' Joint Mem. Ex. 12, at 230) and that 20 to 30 years ago he and Defendant Jam (Arny Granat and Jerry Mickelson) had competed in this manner in Chicago (*id.* at 226-28).

Although Mr. Kapp testified that promoters do take on "baby acts" in the hopes that they would "get another act," his testimony is that he and other promoters did so not because of an ongoing arrangement between the dominant promoters and the booking agencies or because the marketing power of booking agencies forced them to take on such acts, but rather because they hoped to improve their competitive position and prestige in the area and to receive more business from the booking agency. (*Id.* at 173, 226-30.) Thus, Mr. Kapp's testimony does not support Plaintiffs' allegation, but rather raises the strong inference that competition among promoters

led to their taking on "baby acts" and that promoters seek to gain an edge on their competition in the area by occasionally taking on baby acts, even though such acts could increase their potential liabilities. (*Id.*)

Additionally, Plaintiffs assert that Beaver has an economic rationale to participate in the conspiracy because:

> [t]he promoters earn enormous profits by reason of their control over specific territories. The agents, who guarantee the promoters market exclusivity, profit by requiring promoters to promote acts they otherwise would not take, a practice which provides concert outlets for their lesser known or new talent to become groomed for future stardom. Attached to the Rowe Decl. as Comp. Exhibits A and B, respectively, are contracts which show that Beaver has promoted concerts with extremely low guarantees to the artists, *sometimes as low as $1.00,* and Beaver's contracts for the superstar acts such as Celine Dion, Eric Clapton, Michael Bolton, Bette Midler, among others, which Beaver is given in exchange for promoting the lesser known or new talent.

(Pls.' Resp. Beaver Mem. at 7 (emphasis in original) (citations omitted).)

Exhibit A, referred to above, is a single contract on a WMA form for the artist Protein to perform as a special guest at Howlin' Wolf in New Orleans on April 15, 1997, for $100 flat guarantee (not $1.00) with no deposit. (Rowe Beaver Decl., Pls.' Beaver Ex. 6, Ex. A.) The contract contained in Exhibit A refers to Beaver as the "purchaser" but is executed by Howlin' Wolf. Exhibit B contains various contracts on CAA forms and a single contract on a WMA form for the artist Korn to perform in St. Louis, Missouri, on April 24, 1999, with a $101,500 guarantee (versus the right to 85% of the

gross box office receipts after the approved expenses with a deposit of $10,150) to be paid to WMA by April 9, 1999 and the balance of $91,350 plus $23,000 for production to be paid to Korn prior to the first performance. (*Id.* Ex. B.) The Court's review of all of the exhibits did not reveal any testimony showing that CAA gave Beaver the various contracts contained in Exhibit B in exchange for Beaver agreeing to the Howlin' Wolf contract on the WMA form. Nor is a reward from CAA likely for an alleged benefit to WMA. Nor could the Court find any evidence linking the contract on the WMA form for the artist Protein with the contract on the WMA form with Beaver for the artist Korn, a concert which occurred two years later.[59]

Plaintiffs have also failed to present evidence which would tend to exclude the possibility of independent action by the Defendants. *See Monsanto,* 465 U.S. at 764. Plaintiffs allege that the actions of the Defendants were interrelated and interdependent. (Am.Compl.¶ 81.) "Actions against the apparent individual economic self-interest of the alleged conspirators may raise an inference of interdependent action." *Modem Home Inst., Inc. v. Hartford Accident & Indem. Co.,* 513 F.2d 102, 111 (2d Cir.1975). Evidence of actions, which are "only in

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[59] In his declaration dated February 27, 2003, Mr. Rowe cites the above exhibits as evidence supporting the Plaintiffs' conspiracy theory. (Rowe Beaver Decl. ¶ 7.) Mr. Rowe states that his credentials are that he has worked as a concert promoter in the United States for twenty-eight years and has been president of the Black Promoters Association for eight years. (*Id.* ¶ 3.) While that experience might give him some knowledge about the activities of a concert promoter, the overwhelming weight of the evidence is that he has not been active as a concert promoter since the 1970s. His experience, in any event, is insufficient to permit the conclusion that these contracts raise an inference of an agreement between the booking agencies and the promoters regarding as rewards for promoting certain artists.

one's self interest if done in concert with others, may also provide the basis for an inference of illegal conspiracy." *Id.* Although Mr. Kapp's testimony that concert promoters did take on less successful acts in the hopes of receiving other acts may show actions against the apparent self-interest of those promoters, this conduct is "as consistent with permissible competition as with illegal conspiracy" and cannot, "standing alone, support an inference of antitrust conspiracy." *See Matsushita,* 475 U.S. at 588. Mr. Kapp testified that a promoter would take this action to improve its competitive position. (Kapp. Dep., Pls.' Joint Mem. Ex. 12, 173, 225-30.) [60]

3. *Plaintiffs Have Failed to Provide Evidence of Any Injury Resulting from the Alleged Conspiracy*

Although Plaintiffs allege that they have been excluded from promoting contemporary music concerts, Plaintiffs have presented no evidence to show that any of the Plaintiffs have ever been excluded from promoting in the geographic areas designated for Jam and Beaver in the Amended Complaint, or in any other area. Each of the Plaintiffs do business in areas different than Jam and Beaver. Furthermore, the Plaintiffs have seldom, if ever, presented the Booking Agency Defendants with bids to promote concerts. *See infra* pp. 48-49, 52, 54-56, 59-60, 155-57, 162-65. When Plaintiffs have made bids, Plaintiffs have not provided evidence to show that they have been damaged by any concerted action of the Defendants. *See infra* pp. 69-71, 110-15, 148-51.

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[60] Mr. Richard Johnson's affidavit is insufficient to demonstrate any action of the booking agencies that would be against their economic interests since his testimony at most relates to a business practice by WMA from 1982 to 1986.

Plaintiffs assert that there is an antitrust injury because "concerts could profitably be promoted at rates of 5% of revenues or less," in contrast to the 15% of the net sales revenues they allege that Promoter Defendants currently receive. (Am.Compl.¶ 80.) Not only have Plaintiffs offered no evidence to support this alleged antitrust injury,[61] such an injury does not support a § 1 claim because higher promoter fees in the industry tend to benefit Plaintiffs as promoters. *Matsushita,* 475 U.S. at 585 n. 8.

Even if Plaintiffs had antitrust standing, taking the evidence as a whole, no showing of conspiracy is plausible and no reasonable jury could infer a conspiracy in restraint of trade from the evidence Plaintiffs have provided. Thus, Defendants' motions for summary judgment as to the section 1 of the Sherman Act are granted.

IV. DISCRIMINATION CLAIMS

In addition to their claim under the Sherman Act, Plaintiffs have brought claims for compensatory and punitive damages and injunctive relief under three provisions of the Civil Rights Acts of 1866 and of 1991, 42 U.S.C. §§ 1981, 1985(3) and 1986.

A. *Legal Standard for Summary Judgment Motion*

1. *Applicable Statutes*

Section 1981 provides, in pertinent part, that all persons "shall have the same right . . . . to make and enforce contracts . . . . and to the full and equal benefit of all laws and proceedings for the security of persons

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61 *See supra* note 47.

and property as is enjoyed by white citizens."[62] 42 U.S.C. § 1981(a). In order to succeed under § 1981, a plaintiff must present evidence to "show both that he was subjected to intentional discrimination, and that this discrimination interfered with a contractual relationship." *Murray v. Nat'l Broad. Co.*, 844 F.2d 988, 995 (2d Cir.1988) (citations omitted); *see also Runyon v. McCrary*, 427 U.S. 160, 170-71 (1976) ("[Section 1981 right to 'make and enforce contracts' is violated if a private offeror refuses to extend [on account of race] the same opportunity to enter into contracts as he extends to white offerees."); *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 139-40 (2d Cir.1999) ("In order for plaintiff to prevail on his claims for violation of . . . . 42 U.S.C. § 1981, proof of racially discriminatory intent is required.").

Section 1985(3) prohibits, in pertinent part, conspiracies undertaken "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws" and provides for "an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U.S.C. § 1985(3). To prevail on a claim under § 1985(3), a plaintiff must demonstrate that defendants "(1) engaged in a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons the equal protection of the laws, or the equal privileges and immunities under the laws; (3) acted in furtherance of the conspiracy; and (4) deprived such person or class of persons the exercise of any right

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[62] The statute of limitations for claims brought under § 1981 in New York is three years. *Patterson v. County of Oneida*, 375 F.3d 206, 225 (2d Cir.2004).

or privilege of a citizen of the United States." *N.Y. State Nat'l Org. for Women v. Terry,* 886 F.2d 1339, 1358 (2d Cir.1989); *see also Griffin v. Breckenridge,* 403 U.S. 88, 102-03 (1971).

As in § 1981, a showing of intent is crucial in a § 1985(3) claim. "[I]n order to prove a private conspiracy in violation of the first clause of § 1985(3), a plaintiff must show, *inter alia,* (1) that some racial, or perhaps otherwise class-based, invidiously discriminatory animus lay behind the conspirators' action, and (2) that the conspiracy aimed at interfering with rights that are protected against private, as well as official, encroachment." *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 267-68 (1993) (internal quotations omitted).

Section 1986 provides a private cause of action for neglect to prevent conspiracy. Specifically, it states that "[e]very person who, having knowledge [of a § 1985 conspiracy] and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, ... shall be liable . . . . for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented." 42 U.S.C. § 1986. An action for neglect to prevent a conspiracy must be "commenced within one year after the cause of action has accrued." *Id.*

2. *Discrimination Summary Judgment Standard*

In "a discrimination case where intent and state of mind are in dispute, summary judgment is ordinarily inappropriate." *Carlton v.. Mystic Transp., Inc.,* 202 F.3d 129, 134 (2d Cir.2000). Accordingly, "a trial court should exercise caution when granting summary judgment to a [defendant] where . . . . its intent is a genuine factual issue." *Id.*

Nonetheless, at times summary judgment can be appropriate in discrimination cases. "For a plaintiff in a discrimination case to survive a motion for summary judgment, he must do more than present 'conclusory allegations of discrimination,' he must offer 'concrete particulars' to substantiate his claim." *Murphy v. Bd. of Educ.*, 273 F.Supp.2d 292, 299-300 (quoting *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.1985)). As the Second Circuit has pointed out, "To allow a party to defeat a motion for summary judgment by offering purely conclusory allegations of discrimination, absent any concrete particulars, would necessitate a trial in all Title VII cases." *Meiri*, 759 F.2d at 998; *see also Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2d Cir.2001) ("It is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases."); *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 452 (2d Cir.1999) ("Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment.").

In determining summary judgment motions under § 1981, the courts have generally applied the same analysis utilized in Title VII cases, following the burden-shifting scheme established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (U.S.1973) and *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 n. 1 (1993) (assuming that the "*McDonnell Douglas* framework is fully applicable to racial-discrimination-in-employment claims under 42 U.S.C. § 1983"); *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989) (stating that the *McDonnell Douglas/Burdine* scheme of proof "should apply to claims of racial discrimination under § 1981").

Under *McDonnell Douglas*, "the plaintiff has the [initial] burden of proving by the preponderance of the evidence a prima facie case of discrimination." [63] *Burdine*, 450 U.S. at 252-53. The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment action. *Raytheon Co. v.. Hernandez*, 540 U.S. 44, 50 n. 3 (2003); *McDonnell Douglas*, 411 U.S. at 802. If the defendant satisfies this burden, the presumption of intentional discrimination disappears. *Raytheon*, 540 U.S. at 50 n. 3; *McDonnell Douglas*, 411 U.S. at 804. The plaintiff then "must be afforded the 'opportunity to prove by a preponderance of the evi-

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[63] To establish a prima facie case of racial discrimination in the employment context under Title VII, the plaintiff must prove by a preponderance of the evidence:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802.

However, "this standard is not inflexible, as 'the facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect in differing factual situations.' " *Burdine*, 450 U.S. at 254 n. 6 (quoting *McDonnell Douglas*, 411 U.S. at 802 n. 13).

The second element in the employment promotion context generally requires that a plaintiff show that he or she applied for a specific position or positions and was rejected, rather than generally requested promotion. *Petrosino v. Bell Atlantic*, 385 F.3d 210, 227 (2d Cir.2004) (citing *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 710 (2d Cir.1998)). To be excused from the specific application requirement, an employee must demonstrate "that (1) the vacancy at issue was not posted, and (2) the employee either had (a) no knowledge of the vacancy before it was filled or (b) attempted to apply for it through informal procedures endorsed by the employer." *Id.*

dence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.' " *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000) (quoting *Burdine*, 450 U.S. at 253)). "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148.

Under the *McDonnell Douglas* standard, the Supreme Court has found summary judgment on behalf of a defendant appropriate when (1) "the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred;" or (2) "the record conclusively revealed some other, nondiscriminatory reason for the employer's decision." *Reeves*, 530 U.S. at 148.

B. *General Claims Regarding Bidding and Contemporary Music Concert Promotion*

The Amended Complaint alleges that the Defendants prevented and conspired to prevent Plaintiffs from entering concert promotion contracts for white artists and major black artists because of their race. (Am. Compl. ¶ 5.) As for Plaintiffs' prima facie case under § 1981, it is uncontroverted that Plaintiffs are members of a racial minority, and thus, meet the first element of proof set forth in *McDonnell Douglas*.

As to the second element of *McDonnell Douglas*, whether Plaintiffs applied and were qualified for a position, the Amended Complaint alleges that Plaintiffs are "skilled, experienced and financially sound concert promoters," who "are regularly retained by booking agents, including booking agency defendants named herein, to

promote concerts throughout the United States" (*id.* ¶ 4), and that "[d]uring the last several years, plaintiffs have accounted for most of the business done by black concert promoters within the United States" (*id.* ¶ 1). These allegations have been shown to be largely false and misleading.

1. *Promotion Records of Plaintiffs*

Plaintiffs have admitted that for several years they have submitted only a few bids for concert promotions and that they have not had a record of successful contemporary music concert promotion remotely equal to that of the concert Promoter Defendants. Plaintiffs also have presented no evidence that they have been regularly retained to promote concerts throughout the United States or in the Amended Complaint's designated territories for the Promoter Defendants Jam and Beaver. Furthermore, other black promoters have accounted for most of the business done by black promoters in the United States. The following facts, unless otherwise noted, are undisputed.

(i) Leonard Rowe, Rowe Entertainment

Leonard Rowe has worked in the concert promotion business for over twenty-six years. (Joint 56.1 Stmt. ¶ 52.) He is currently president of Rowe Entertainment, Inc., which was incorporated in 1998 and is located in Atlanta, Georgia. (*Id.* ¶¶ 53-54.) Mr. Rowe mainly specializes in R & B music, not pop or rock. (Rowe Dep., in J.A., Vol. VI, at 237.) Rowe Entertainment employs one other person, LaShonda Goodwin, who serves as secretary to Mr. Rowe and Rowe Entertainment. (Joint 56.1 Stmt. ¶ 54.)[64]

[64] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 54 is considered as if undisputed.

(a) Bids

Mr. Rowe does not remember having submitted any written proposals to promote concerts from 1988 to 1998. (*Id.* ¶60.)[65] From 1998 to 2001, he submitted at most three written offers, not for concerts, but for national tours.[66] Mr. Rowe has never submitted a written bid to promote a white artist. (*Id.* ¶61.)[67] Additionally, he has never bid for any concert that a white promoter bid on at the same time. (*Id.* ¶63.)[68]

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[65] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶60 is considered as if undisputed. Mr. Rowe produced no concert files prior to 1997. (Rowe Dep., in J.A., Vol. VI, at 838.) Mr. Rowe testified that the files of any concerts he did with Mr. Haymon from 1984 to 1997 were retained by Mr. Haymon, and before 1984, his concert files were mistakenly thrown away. (*Id.*)

[66] Mr. Rowe submitted an offer to CAA for the Janet Jackson tour in 29 cities in 1998. (Joint 56.1 Stmt. ¶59; Rowe Dep., in J.A., Vol. VI, at 134-35.) Mr. Rowe also submitted an offer to WMA for certain markets on the 1998 Maxwell tour. (Letter from Mr. Rowe to Jeff Frasco of WMA, dated July 20, 1998 ("Rowe 1998 Maxwell Offer"), Pls.' Rev. Jam Mem. Ex. 1A, at 1) Mr. Rowe's letter did not include venues, dates, artist's split or other key terms for a specific concert that would allow an artist or an artist's manager to compare his offer to other promoters' offers for these cities. However, it will be considered, as WMA acknowledges, an offer for the 1998 Maxwell tour. (Mem. of Law in Supp. of WMA's Mot. for Summ. J., dated Feb. 28, 2003 ("WMA Mem."), at 8 n. 5.) Plaintiffs cite to Mr. Rowe's testimony that he had submitted a written bid for concerts by Lauryn Hill. (Pls.' Am. Joint 56.1 Stmt. ¶59 (citing Rowe Dep., in J.A., Vol. VI, at 1172-74).) Plaintiffs did not supply the Court with a copy of Mr. Rowe's Lauryn Hill bid. The testimony suggests it was only an expression of interest. (Rowe Dep., in J.A., Vol. VI, at 1174.)

[67] Plaintiffs' reply is non-responsive and admits the facts in question; Joint Statement ¶61 is considered as if undisputed.

[68] Plaintiffs' reply is non-responsive and admits the facts in question; Joint Statement ¶63 is considered as if undisputed.

(b) Track Record as a Promoter

Plaintiffs acknowledge that Plaintiff Rowe promoted no more that ten shows per year and most of those were co-promotion arrangements. (Pls.' Rev. Jam 56.1 Stmt. ¶35.)[69] All of the shows he worked on were co-promotions, and most were done through Mr. Alex Haymon, a successful black promoter. (Rowe Dep., in J.A., Vol. VI, at 88.) Mr. Haymon would take financial responsibility for the tour, while Mr. Rowe was involved primarily with facilitating advertising and doing general street promotion. (*Id.* at 697-699; Haymon Dep., in J.A., Vol. IV, at 498-99.) Mr. Haymon testified that while working with Mr. Rowe during the period from 1990 to 2002, Mr. Rowe never put any of his own money at risk. (Haymon Dep., in J.A., Vol. IV, at 499.)[70]

In the period from 1991 to 2001, Mr. Rowe was involved in the promotion of live contemporary music performances outside the state of Georgia on only two occasions. (Joint 56.1 Stmt. ¶55.)[71] Mr. Rowe has not

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[69] Co-promoters generally do not conduct the financial negotiations for a concert.

[70] Mr. Rowe testified that Mr. Haymon takes financial responsibility for the tours, but that he would "sometimes put up the expense for" the advertising he undertook. (Rowe Dep., in J.A., Vol. VI, at 697.)

[71] Plaintiffs dispute this statement, asserting that "Mr. Rowe testified he promoted many live music performances outside of the state of Georgia." (Pls.' Am. Joint 56.1 Stmt. ¶55.) Plaintiffs, however, cite only to the same deposition testimony of Mr. Rowe as cited in Joint 56.1 Statement ¶55, in which the only concerts Mr. Rowe mentions specifically are concerts on: (1) the Kenny G/Toni Braxton tour, which he asserts he "sharecropped," did no work, and was paid for his silence (Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶22); (2) a Sugar Daddy tour, a gospel (non-contemporary) music tour, and (3) the Puff Daddy tour (no further explanation provided). (Rowe Dep., in J.A., Vol. VI, at 202-03). As Plaintiffs have failed to provide

acted as the lead promoter for any concert since the mid-1980s, when he promoted two shows for the Temptations in Georgia (Joint 56.1 Stmt. ¶56;[72] Rowe Dep., in J.A., Vol. VI, at 64, 67-68, 1117), nor has he paid an artist deposit or a venue deposit (Rowe Dep., in J.A., Vol. VI, at 88-89).[73] Mr. Rowe did promote a concert tour for the Jacksons in 1979. (Aff. of Mahlon Jackson, dated Apr. 10, 2003, Pls.' Am. Joint 56.1 Stmt. Ex. 2, ¶4.) In 1979, Rowe stopped payment on a check for the Jacksons for $150,000. (Rowe Dep., in J.A., Vol. VI, at 329-30.) He was not called on to promote the Jackson Tours in 1981 or 1984. (*Id.* at 1129-30.) The Jacksons have not used Mr. Rowe for concert promotion since 1979. (*Id.* at 333.)

(c) Financial Capabilities

In 1984, Mr. Rowe filed for bankruptcy. (*Id.* ¶68.)[74] His gross income that year was $20,000, and he owed at least $312,000 to the Columbus Bank and Trust, which sued him that year for $600,000. (*Id.*) Mr. Rowe also had

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citation to evidence controverting Joint 56.1 Statement ¶55, that paragraph is considered as if undisputed.

[72] Plaintiffs state that Joint Statement ¶56 is disputed, citing to Mr. Rowe's promotion of the "Sugar Daddy national tour." (Pls.' Am. Joint 56.1 Stmt. ¶56.) Sugar Daddy, however, was a "gospel musical play" (Rowe Dep., in J.A., Vol. VI, at 336), not a concert performance of contemporary music within the scope of the Amended Complaint in this litigation. As Plaintiffs' reply is non-responsive, Joint Statement ¶56 is considered as if undisputed.

[73] In this period, Mr. Rowe has only once been made responsible for part of the artist's guarantee. (*Id.* at 295.) During the 1998 Janet Jackson Tour, promoted by Magicworks, $100,000 of the monies due Mr. Rowe from concert ticket sales as a co-promoter were held as a deposit until after the show. (*Id.*)

[74] Plaintiffs' reply is non-responsive and admits the facts in question; Joint Statement ¶68 is considered as if undisputed.

a number of civil lawsuits filed against him for smaller outstanding debts, several tax liens issued against him, and approximately $50,000 in other secured debt. (*Id.*) At the time of his deposition in 2002, Mr. Rowe had an outstanding balance owed to Columbus Bank and Trust in the amount of approximately $600,000 in principal and interest. (*Id.* ¶ 70.)

In 1986, Mr. Rowe was indicted by a grand jury for passing a check drawn on a non-existent bank account. (*Id.* ¶ 72.) Mr. Rowe pleaded guilty and was ordered to serve three years probation. (*Id.*) The terms of Mr. Rowe's probation included paying restitution in the amount of $5,833 by May 1, 1987. (*Id.*) Mr. Rowe was arrested on or about June 8, 1987, for failing to pay the restitution and was subsequently sentenced to serve six months in state prison for violating the terms of his probation. (*Id.* ¶ 73.) Mr. Rowe was convicted of wire fraud for his role in the cashing of a fraudulent insurance check in or around 1984 and sentenced to five years in a federal penitentiary. (*Id.* ¶ 74.) He was incarcerated from October 1990 to April 1992. (*Id.*) Mr. Rowe has been arrested on other occasions for writing bad checks. (*Id.* ¶ 75.) Additionally, Mr. Rowe had at least seven tax liens issued against him from 1979 to 1995. (*Id.*) Mr. Rowe's accountant ultimately negotiated a deal with the federal government, and, after the commencement of this litigation, Mr. Rowe had paid a portion of his debt and was released from the liens by 1999. (*Id.;* Rowe Dep., J.A., Vol. VI, at 474-75.)

Before the start of this lawsuit, Mr. Rowe earned $52,000 in income from concerts in 1996, and he earned $79,000 from concerts in 1997.[75] (*Id.* ¶ 71.)

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[75] *But see infra* note 115. In 1997, Mr. Rowe obtained a contract for a portion of concert promotion for concerts on the Toni Braxton tour, but he did not perform any services. (Rowe Jam Aff. I, Pls. Rev. Jam Ex. 1, ¶ 22.)

(ii) Jesse Boseman, Sun Song Productions

Plaintiff Boseman formed Sun Song Productions, Inc. ("Sun Song") in 1976. (Joint 56.1 Stmt. ¶97.) Mr. Boseman is its sole shareholder and chief executive. (Am.Compl.¶ 14.) In addition to Sun Song, Mr. Boseman has formed two other businesses: Harlem International Records and Black Expo. (Boseman Dep., in J.A., Vol. III, at 79-80.) Black Expo is a consumer exposition for entrepreneurs seeking to develop their businesses. (*Id.* at 80.) Sun Song is located in New York and has two full-time employees, Mary Cassaberry, who serves as office manager and Shahana Williams, who serves as a receptionist. (Boseman Dep., in Pls.' Am. Joint 56.1 Stmt. Exs., Vol. II, at 127-30.) About half of Ms. Cassaberry's time is spent working on Black Expo matters. (Cassaberry Dep., in J.A., Vol. IV, at 40.) Additionally, Sun Song has several independent contractors it uses to work on promotions. (Boseman Dep., in J.A., Vol. III, at 130-32.)

(a) Bids

Mr. Boseman does not know if Sung Song has submitted a written bid to any booking agency in the last five years. (Joint 56.1 Stmt. ¶ 112.)[76] In discovery, Mr. Boseman produced only three concert contracts for performances and all were for concerts after the commencement of this action. (*Id.* ¶ 113.) One of these concerts was by an artist represented by WMA. (J.A. Vol. II, Ex. 35 (Letter from Berkeley Reinhold of WMA to Phil Robinson, Jesse Boseman and Brian O'Connell, dated Aug. 17, 1999, regarding a Maxwell concert).) During his [illegible]-year career, Mr. Boseman has never

[76] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶112 is considered as if undisputed.

submitted a written bid to any booking agency to promote any white artist. (Joint 56.1 Stmt. ¶ 111.)[77]

(b) Track Record as a Promoter

Plaintiffs acknowledge that Mr. Boseman has promoted an average of ten shows per year for the last decade, almost all of which were co-promotions. (Pls.' Rev. Jam 56.1 Stmt. ¶ 36.) Mr. Boseman works on concerts almost exclusively in his local market of "New York and along the East Coast of the United States." (Joint 56.1 Stmt. ¶ 100.)[78] He has never promoted a national tour. (Joint 56.1 Stmt. ¶ 101.)[79] According to Ms. Cassaberry, approximately 90% of Sun Song's business is co-promotion, 75% of which is done through Al Haymon. (Cassaberry Dep., in J.A., Vol. IV, at 27.) In the last twenty years, Mr. Boseman has worked almost exclusively as a "consultant" or "street promoter" for Al Haymon, distributing flyers and hanging up posters in the New York area for a fixed fee. (Joint 56.1 Stmt. ¶ 104.)[80] As a consultant, Mr. Boseman provides "promotional expertise" and gets paid whether the show makes or loses money. (*Id.* ¶ 108.)

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[77] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 111 is considered as if undisputed.

[78] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 100 is considered as if undisputed.

[79] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 101 is considered as if undisputed.

[80] Plaintiffs' reply is largely non-responsive. However, Mr. Boseman testified that he was sole promoter for Luther Vandross in 1986 or 1987 in the Raleigh, North Carolina area. (Boseman Dep., in J.A., Vol. III, at 99-100.) This does not controvert Joint Statement ¶ 104, and thus it is considered as if undisputed.

(c) Financial Capabilities

Sun Song has a line of credit with Chase Bank with a maximum authorized amount of $50,000, from which it has never drawn. (*Id.* ¶ 115.) Typically, Mr. Boseman's investors in shows are his accountant, his doctor, and sometimes his lawyer. (*Id.* ¶ 116.) The largest deposit Sun Song has ever paid was $100,000 in connection with an R. Kelly show on May 8, 2000, of which Sun Song only paid half, or $50,000. (*Id.* ¶ 117.)

Mr. Boseman's tax returns for 1996 to 1999 show that his adjusted gross income for each tax year was a negative number (i.e., negative $1,992 for 1999 and as low as negative $17,511 for 1996). (*Id.* ¶ 118.) Sun Song's financial statements for 1994 to 2000 show that its net income was negative for all but one year. (*Id.* ¶ 119.) In 1997, which was Sun Song's most successful year, its net income was $12,464. (*Id.* ¶ 120.)

(iii) Lee King, King Productions

Mr. King is a local promoter in Jackson, Mississippi, and has been in the concert business for approximately thirty years. (*Id.* ¶ 79.) Mr. King formed Lee King Productions in 1978. (*Id.* ¶ 81.) Lee King Productions has no regular, full-time employees, and its offices are located in Mr. King's home. (*Id.* ¶ 84.)[81]

(a) Bids

Mr. King has said that he either never submitted, or has no recollection of submitting, a bid to CAA (Aff. of Lee King, dated Apr. 24, 2003 ("King CAA Aff."), attached as Ex. 4 to Exs. Pls.' Resp. in Opp'n to CAA's Mot. for Summ. J., undated (received May 5, 2003)

[81] Plaintiffs' reply is non-responsive and admits the facts in question; Joint 56.1 Statement ¶ 84 is considered as if undisputed.

("Pls.' CAA Exs."), ¶21), WMA (King Dep., in J.A., Vol. V, at 1065-66), or Renaissance (*id.* at 813-15). Mr. King could cite no example of when he submitted a bid for a major black act which he "believes" was turned down because of a conspiracy on the part of Defendants. (*Id.* at 218.) Mr. King testified that since he has been a concert promoter he has never put in a bid on a major white act. (*Id.*)

(b) Track Record as a Promoter

Plaintiff King has promoted an average of four shows per year. (Pls.' Local Rule 56.1 Stmt. of Disputed Facts in Supp. of Resp. Renaissance's Mot. for Summ. J., dated Apr. 24, 2003 ("Pls.' Renaissance 56.1 Stmt."), ¶10.) Mr. King has not been the lead promoter in any concert since he promoted the Gap Band from 1983 to 1984 and has never been the lead promoter for a national tour. (Joint 56.1 Stmt. ¶¶88-89.) All concerts for which Mr. King was the lead promoter were in Mississippi, except for two concerts in Louisiana in 1983. (*Id.* ¶90.)

Mr. King testified that he has had no promotion contracts since 1998 and that most of his work has come through Al Haymon. (King Dep ., in J.A., Vol. V, at 103.) Although Mr. King consults on Mr. Haymon's national tours, Mr. King's work generally is performed in Mississippi, which is his local market. (Joint 56.1 Stmt. ¶92.) Mr. Haymon would consult with Mr. King regarding issues like ticket prices, media and street promotion in the Mississippi market. (Haymon Dep., in J.A., Vol. IV, at 37.) In the last 20 years, Mr. King has not put up money for an artist or venue deposit, nor did he risk have any of his own money while working with Mr. Haymon. (*Id.* at 33-35.) Mr. King produced a total of

five concert contracts during discovery for this action. (Joint 56.1 Stmt. ¶94.)[82]

(c) Financial Capabilities

Mr. King owns real estate valued at $52,000, but does not own stock worth over $10,000 or have a bank account with a balance in excess of $10,000. (King Dep., in J.A., Vol. V, at 212.) Lee King Productions has never applied for a loan and did not have a credit card until 2001. (Joint 56.1 Stmt. ¶85.)[83] Lee King Productions relies on cash reserves and individual investors for capital. (King Dep., in J.A., Vol. V, at 151-52.) The largest guarantee that Lee King Productions has paid is approximately $12,500. (Joint 56.1 Stmt. ¶87.) Mr. King's financial records show that his net income for 1993, 1995, and 1996 were all in the negative (respectively, negative $5,168, negative $25,446, and negative $26,197). (*Id.* ¶96.)

(iv) Fred Jones, Summitt Management Corporation

(a) General

Mr. Jones has promoted concerts since 1976, initially under the name Star Entertainment, a company he formed in 1981. (Jones Dep., in J.A., Vol. IV, at 12-13.) Star Entertainment declared bankruptcy and went out of business in 1982 or 1983 after a series of shows promoted by Mr. Jones were not profitable. (Joint 56.1

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[82] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶94 is considered as if undisputed in part.

[83] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶85 is considered as if undisputed.

Stmt. ¶ 121 .)[84] Mr. Jones then formed Summitt in 1984[85] (Pls.' Am. Joint 56.1 Stmt. ¶ 122; Jones Dep., in J.A., Vol. IV, at 19), which focuses on event management for corporate clients (Jones Dep., in J.A., Vol. IV, at 18-20). Most of its business is pulling in events for corporate sponsors as opposed to concert promotions for artists.[86] In this capacity as consultant for corporate-sponsored events, Mr. Jones usually receives a fixed fee for his services and does not assume any financial risk in the success or failure of the concert engagements on which he consults. (*Id.* at 213-19.)

Plaintiffs acknowledge that Plaintiff Jones has promoted an average of three to four shows per year but only in the capacity of co-promoter. (Pls.' Rev. Jam 56.1 Stmt. ¶ 37.) During the entirety of his career, Mr. Jones, through Summitt, has never submitted a bid to promote a concert involving a white artist. (Joint 56.1 Stmt. ¶ 128.)[87] Mr. Jones testified that no one at any time has ever prevented him from submitting a bid for a white act. (Jones Dep., in J.A., Vol. IV, at 227-28.)

Mr. Jones promotes almost exclusively in Memphis, Tennessee, and has not actively sought to promote any concerts outside of Memphis since the early 1980s.

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[84] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 121 is considered as if undisputed.

[85] *See supra* note 7.

[86] Summitt has been employed as a consultant for major corporations like Seagrams, Phillip Morris, Ford, Coca-Cola, Federal Express, Auto Zone, Exxon, Mobile, Texaco, and numerous others in putting on or sponsoring events as opposed to concert promotion. (Joint 56.1 Stmt. ¶ 122.) Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 122 is considered as if undisputed.

[87] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 128 is considered as if undisputed.

(Joint 56.1 Stmt. ¶ 130.) Mr. Jones has not submitted a bid for an entire tour for any artist since 1981. (*Id.* ¶ 127.)[88] In 2000 and 2001, the only concert event that Mr. Jones personally promoted, i.e., assumed the financial risk, was the "Southern Heritage Classic," an annual weekend event Mr. Jones started in 1990 that involves a football game between two historically black colleges and performances by musical artists at different venues in Memphis.[89] (*Id.* ¶ 125.)

(b) Island Events

In 1992, Summitt Management and Mid-South Concerts, a company owned by white promoter Bob Kelley, formed a partnership called Island Events. (Jones Beaver Decl., Pls.' Beaver Ex. 1, ¶ 5.) Plaintiffs assert that Mid-South Concerts was the dominant promoter in Memphis. (Pls.' Resp. Beaver Mem. at 21.) Island Events, in which Mr. Jones was a one-third partner, promoted numerous concerts of white and black artists at the Mud Island Amphitheatre in Memphis, Tennessee. (Joint 56.1 Stmt. ¶¶ 139-41.)[90]

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[88] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 127 is considered as if undisputed.

[89] Jones has never sought out, or bid on, any white acts for the Southern Heritage Classic. (Jones Dep., in J.A., Vol. IV, at 221-22.) During the years covered by this action, Mr. Jones has been an owner/limited partner of the Memphis Grizzlies, a National Basketball Association team. (Jones Beaver Decl., in Pls.' Beaver Ex. 1, ¶ 2.)

[90] Plaintiffs' replies are non-responsive; Joint Statement ¶¶ 139-141 are considered as if undisputed.

2. *Promotion Records of Other Successful Black Promoters*

The evidence shows that other black concert promoters have been far more successful than Plaintiffs.[91] Non-party Alex Haymon, a black promoter, testified that his company promoted an average 150 shows per year since 1985. (Joint 56.1 Stmt. ¶¶ 168, 170;[92] Haymon Dep., in J.A., Vol. IV, at 26- 27.) Plaintiff King testified that Mr. Haymon has a bigger volume of business than the Plaintiffs collectively. (King Dep., in J.A., Vol. V, at 208.) Mr. Haymon testified that his success has been greater than that of most "white" concert promoters. (Joint 56.1 Stmt. ¶ 170.)[93] Mr. Haymon has offices in Boston and Atlanta, in which he employs eight to ten full-time employees to handle all aspects of promotion and production. (*Id.* ¶ 176.) He also employs eight to ten contract employees for tours. (*Id.*) Mr. Haymon has put up pre-performance deposits of $1,000,000. (Haymon Dep., in J.A., Vol. IV, at 139-40.)

Non-party Darryl Brooks, a black promoter, testified he promotes 100 to 200 concerts per year. (Joint 56.1

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[91] Plaintiffs themselves have admitted that their "claim in the Amended Complaint that they represent the majority of business done by black concert promoters is false because [Mr. Haymon] actually accounts for the lion share of the concerts promoted by black promoters, not the plaintiffs." (Pls.' Am. Joint 56.1 Stmt. ¶ 165 (accepting as undisputed Joint 56.1 Stmt. ¶ 165).)

[92] Plaintiffs dispute this statement, but do not provide citation to evidence as required by Local Civil Rule 56.1. (Pls.' Am. Joint 56.1 Stmt. ¶ 170.) Joint 56.1 Statement ¶ 170 is considered as if undisputed.

[93] Plaintiffs dispute this statement, but do not provide citation to evidence as required by Local Civil Rule 56.1. (Pls.' Am. Joint 56.1 Stmt. ¶ 170.) Joint 56.1 Statement ¶ 170 is considered as if undisputed.

Stmt. ¶ 189.)[94] His company, CD Enterprises, has seven employees that handle all aspects of concert production and promotion. (Joint 56.1 Stmt. ¶ 190.)[95]

Non-party Larry Bailey, a black promoter, has been promoting since 1962, mainly on the West Coast. (Joint 56.1 Stmt. ¶¶ 181-82, 184.) Mr. Bailey testified that approximately 50% of the concerts he, or his company Lar-Vic, has promoted in his career have been for white artists. (Joint 56.1 Stmt. ¶ 186;[96] L. Bailey Dep., in J.A., Vol. III,. at 21-22.)

Non-party Bill Washington, a black promoter, promoted forty-three concert events in 1999, thirty-two concert events in 2000, thirty-nine concerts events in 2001, and nineteen concert events from January through May of 2002. (Joint 56.1 Stmt. ¶¶ 191, 193.) Mr. Washington testified that he has paid pre-performance deposits in the amount of $100,000. (*Id.* ¶ 192.)

Non-party Earvin "Magic" Johnson, Jr., a black promoter, owns Magic Johnson Productions ("MJP") which, since 1998, has profitably promoted or co-promoted several national concert tours for major artists. (Joint 56.1 Stmt. ¶¶ 194-95.)

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[94] Plaintiffs dispute whether CD Enterprises paid a deposit in excess of $400,000, but do not provide citation to evidence as required by Local Civil Rule 56.1. (Pls.' Am. Joint 56.1 Stmt. ¶ 189.) Mr. Brooks testified that he was unsure of whether this was the final negotiated deposit. (Brooks Dep., in J.A., Vol. III, at 56 .)

[95] Plaintiffs dispute this statement, but do not provide citation to evidence as required by Local Civil Rule 56.1. (Pls.' Am. Joint 56.1 Stmt. ¶ 190.) Joint 56.1 Statement ¶ 190 is considered as if undisputed.

[96] Plaintiffs dispute this statement, but do not provide citation to evidence as required by Local Civil Rule 56.1. (Pls.' Am. Joint 56.1 Stmt. ¶ 186.) Joint 56.1 Statement ¶ 186 is considered as if undisputed.

3. *Promotion Records of Promoter Defendants*

In their motion papers replying to Jam's motion, Plaintiffs assert that concert Promoter Defendant Jam promotes on average 600 or 700 shows per year, and in 2001 and 2002, promoted 400 to 1,200 shows. (Pls.' Rev. Jam 56.1 Stmt. ¶¶ 3-4.) Jam counters that this figure included all shows, not only contemporary music events, and events in other cities, and that in the Chicago area, it promotes 200 to 300 or more contemporary music concerts a year. (Mickelson Decl. II, Roberts Decl. Ex. 1, ¶ 18.) Plaintiffs assert that Jam has dominated the Chicago area since the late 1970s or early 1980s. (Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶ 11.)

Beaver, on average, has promoted 200 concerts per year throughout North America. (Leff Dep., Pls.' Beaver Ex. 4, at 104.) The majority of these concerts have occurred in the greater New Orleans area. (Fox Decl., Beaver Ex. 1, ¶ 3) Plaintiffs assert that Beaver has been dominant in the areas designated in the complaint since the early 1980s. (Pls.' Resp. Beaver 56.1 Stmt. ¶ 22.)

4. *Plaintiffs Have Not Shown They Submitted Bids to Booking Agency Defendants as Required Under McDonnell Douglas*

Plaintiffs have presented virtually no evidence demonstrating that they submitted bids to any Booking Agency Defendant for a concert later promoted by any Promoter Defendant, or any other promoter.[97] In fact, the unre-

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[97] Defendant Jam asserts that Plaintiffs have provided no evidence that they have "ever submitted a bid in competition with Jam." (Jam 56.1 Stmt. ¶ 42.) In response, Plaintiffs assert that Mr. Rowe submitted a bid on the 1998 Maxwell tour in competition with Jam. (Pls.' Counter Jam 56.1 Stmt. ¶ 42.) However, as stated *infra* note 146, Mr. Rowe's letter to WMA did not contain the particulars to be

butted evidence is that Plaintiffs had little contact with the Booking Agency Defendants until immediately before this lawsuit was filed. According to Peter Grosslight, senior vice president of WMA, Plaintiffs "were not, at least in the past 10 years, among the concert promoters who actively sought to promote concerts by WMA's clients." (Grosslight Decl. I ¶ 17.) Rob Light, director of CAA's music division, testified that the first contact he had with Mr. Rowe was in 1996; that prior to this litigation, he knew that Mr. Boseman was a promoter in New York, but believed he did not promote shows by himself; and that prior to this litigation he had no knowledge of Mr. King or Mr. Jones. (Light Dep., in J.A., Vol. V, at 435-37.) Also, David Zedeck, president of Renaissance, stated that prior to the service of the

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a concert bid and is considered an offer for the Maxwell tour in 1998. The 1998 tour was cancelled. Plaintiffs also assert that Mr. Boseman submitted a bid for a Kenny G/Braxton concert in competition with Jam. (*Id.*) However, as stated *infra* pp. 76-78, the evidence shows that Mr. Boseman and Mr. Rowe only discussed the possibility of promoting this concert *after* the concert had been awarded to Jam. No party testified or presented any document about such a bid. Plaintiffs also make reference to a concert by Seal, but provide no evidence that any bid was even submitted, let alone in competition with Jam. (*Id.*) Plaintiffs present no evidence showing that Plaintiff King submitted a bid in competition against Jam. (*Id.*)

Defendant Beaver asserts that Plaintiffs have never submitted a bid in competition with Beaver. (Beaver 56.1 Stmt. ¶ 14 (citing Fox Decl., Beaver Ex. 1, ¶ 7).) Plaintiffs' reply is unresponsive and claims that Beaver submits no bids. (Pls.' Resp. Beaver 56.1 Stmt. ¶ 14.) The latter assertion is refuted *infra* p. 62.

Plaintiffs have also provided no evidence that they submitted bids for concerts to the Booking Agency Defendants, aside from two tour offers for Maxwell and Janet Jackson by Mr. Rowe, prior to the bringing of this lawsuit. (*See* Rowe Dep., in J.A. Vol. VI, at 138-39; Boseman Dep., in J.A., Vol. III, at 465-66; King Dep., in J.A., Vol. V, at 175, 217-18, 813-15, 1065-66; Jones Dep., in J.A., Vol. IV, at 208-13.)

complaint he had no knowledge of Plaintiffs Rowe, Boseman or King as concert promoters or otherwise and recalled Plaintiff Jones as a producer of corporate events not as an independent concert promoter. (Zedeck Decl. I ¶¶ 13-14.)

Plaintiffs themselves have repeatedly admitted their own lack of bids. They take the position that, given the long-standing discrimination in the industry and the lack of a true competitive atmosphere, submitting bids would have been a worthless endeavor on the part of black promoters.[98] (*See, e.g.*, Boseman Dep., in Pls. Am. Joint 56.1 Stmt., Vol. II, at 370; Jones Dep., in Pls.' Am. Joint 56.1 Stmt., Vol. II, at 226-28; King CAA Aff., Pls.' CAA Ex. 4, ¶ 21; Aff. of Leonard Rowe, dated Apr. 24, 2003 ("Rowe CAA Aff ."), Pls.' CAA Ex. 1, ¶ 200.)

As part of this alleged long-standing discrimination, the Amended Complaint asserts that "[n]o black promoter, including plaintiffs, has been able to contract to promote a contemporary music concert given by a white artist, or even been given the opportunity to bid on such promotion," and "plaintiffs are regularly excluded from the promotion of concerts given by top-drawing black performers." (Am.Compl.¶ 1.) The evidence shows, however, that black concert promoters have promoted concerts for well-known white artists as well as well-known black artists. Although Mr. Haymon focuses his business on urban music by major black artists, he has promoted white artists, including Jean Luc Ponte, Charles

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[98] Plaintiffs argue also that "[b]y the time black promoters, including the Plaintiffs, find out about the fact that a white artist or superstar black artist is touring, the dates have been sold to white promoters," there is no opportunity to bid. (Decl. of Leonard Rowe, dated Feb. 27, 2003, attached as Ex. 6 to Pls.' Joint Mem. Exs., Vol. I, ¶ 18.) However, promoters may learn of an opportunity to promote by calling booking agents, or artists' managers. (Joint Stmt. 56.1 ¶¶ 20-21.)

Aznavour, Steely Dan, Vanilla Ice, Christina Aguilera, Jessica Simpson, Dream, Cleo Laine and John Dankworth. (Joint 56.1 Stmt. ¶ 202.) Also, contrary to the allegations in paragraph one of the Amended Complaint, black promoters have promoted major black artists. Mr. Haymon promoted the following major black artists: Janet Jackson when she was represented by CAA; Whitney Houston when she was represented by WMA (Haymon Dep., in J.A., Vol. IV, at 124); Destiny's Child with CAA (*id.* at 176-77); New Edition with CAA (*id.* at 204-05); and Stevie Wonder with CAA (*id.* at 205). Mr. Brooks has promoted or co-promoted the following white acts: Rolling Stones, Conway Twitty, Waylon Jennings, Willie Nelson, and Eminem. (Brooks Dep., in J.A., Vol. III, at 26-29, 40.) Mr. Bailey has promoted numerous white acts over the course of his career, including Steppenwolf, Three Dog Night, Johnny Winter, Robin Trower and Edgar Winter, Harry Connick, Jr., Kenny G, War and the Average White Band, and the rock groups Styx, Rush, Kiss and the Young Rascals. (Joint 56.1 Stmt. ¶ 201.)[99] Mr. Washington has promoted or co-promoted the following white acts: New Kids on the Block (Washington Dep., in J.A., Vol. VI, at 245-246); Joan Baez (*id.* at 294); Michael Franks, Rare Earth, The Average White Band, and Santana (*id.* at 141-47). (Joint 56.1 Stmt. ¶ 203.)

Plaintiffs also assert that submitting bids would be futile because concert Promoter Defendants are automatically awarded concerts without submitting bids. Plaintiffs maintain that "Beaver has willingly accepted the promoting opportunities the agencies have given to it without even having to bid, knowing that black promoters, including the Plaintiffs, were never told about

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[99] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 201 is considered as if undisputed.

these dates, much less given an opportunity to bid for them."[100] (Pls.' Resp. Beaver 56.1 Stmt. ¶ 18.) Similarly, Plaintiffs claim there is not competitive bidding in Jam's territory and that this is well known to Jam. (Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶ 9.) Plaintiffs, however, cite to no evidence that Jam or Beaver did not submit bids for concerts. Beaver, on the other hand, produced copies of bids submitted containing the date and venue, the amount of the artist guarantee and artist/promoter split of gross less expenses plus a list of expenses. (Court Ex. A (handed in at Hearing on 10/16/03); *see also* Aff. of Steven Mark Grishman, dated Mar. 13, 2003 ("Grishman Aff."), attached as Ex. 1 to Beaver Reply Mem., ¶ 8 (stating that the documents with Bates numbers matching those of Court Exhibit A contain ninety-seven separate and distinct bid sheets).)

Mr. Rowe asserts that he has examined the files of the Defendants and that Defendant Promoters are not required to submit written bids.[101] (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 11; Aff. of Leonard Rowe, dated Apr.

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[100] Plaintiffs also assert that "[t]he facts when taken as a whole demonstrate that Beaver in fact *prevented* the Plaintiffs and other black promoters from submitting a bid to promote or co-promote concerts." (Pls' Resp. Beaver 56.1 Stmt. ¶ 18 (emphasis added).) Plaintiffs do not provide any evidentiary support to show that any defendant, including Beaver or Jam, has taken any action to prevent them from submitting a bid to promote a concert.

[101] The record shows that Plaintiffs' former counsel (along with other attorneys and paralegals), Mr. Rowe and Mr. King examined the files. (*See* Decl. of Laura L. Mall, Esq., dated Apr. 22, 2003, attached as Ex. 7 to Pls.' Resp. Mem. in Opp'n to Defs.' Mot. to Exclude Pls.' Expert Witness Dr. Gerald D. Jaynes's Affidavit, dated Apr. 24, 2003, ¶¶ 9-10.) There is no showing that Mr. Rowe examined all files. This statement that Defendant Promoters are not required to submit written bids is conclusory. Nor have Plaintiffs requested any Defendant to admit Mr. Rowe's conclusion.

21, 2003 ("Rowe WMA Aff."), Pls.' Resp. WMA Ex. 1, ¶ 12; Aff. of Leonard Rowe, dated Apr. 24, 2003 ("Rowe Renaissance Aff."), Pls.' Renaissance Ex. 1, ¶ 9.) WMA has produced to the Court data based on its computer files, furnished to Plaintiffs in discovery, showing the number of bids received, accepted, and rejected, as well as documents showing that bids of the so-called dominant promoters had been rejected. (Decl. of Peter Grosslight, dated May 22, 2003 ("Grosslight Decl. II"), ¶ 14, Ex. 5; *see also* Lewis Decl. ¶ 12, Exs. 5, 6.)

In addition to the aforementioned evidence contradicting his assertion, Mr. Rowe's claim of no bids is implausible. Artists and artists' managers would not enter into a contract without receiving information from the concert promoter about the back end split, the venue, venue seating capacity, the artist's guaranteed profit and deposit arrangement and agreed upon expenses to be deducted from gross profits. Additionally, if they did not prefer the promoter for other reasons, the artist or artist's manager would want to see evidence that the bid was competitively priced. Defendants have a policy to pass on all bona fide bids to artists or artists' managers. (Grosslight Decl. I ¶ 17; Light Decl. I ¶ 10.) Furthermore, the independent evidence from artists' managers is that they received the bids when selecting promoters, and this testimony has not been challenged by Plaintiffs. (Azoff Decl., Grosslight Decl. I Ex. 1, ¶ 5; Phillips Dep., in J.A., Vol. V, at 103; Brown Dep., in J.A., Vol. III, at 23- 29; Weisner Dep., in J.A., Vol. VI, at 8, 12, 26-27, 29.)

(i) Conclusion

Plaintiffs have not presented evidence that they applied to be the promoters of contemporary music concerts that the Defendant Promoters Jam and Beaver were

successful in contracting. Furthermore, the undisputed evidence strongly suggests that Plaintiffs Rowe, Boseman and King did not have the capital, credit record, financial resources or record of successful concert promotion to compete for major acts with established black or white concert promoters. The evidence shows only that Plaintiffs have marginal backgrounds as independent concert promoters.

Plaintiffs have also failed present evidence of a general conspiracy among the Booking Agency and concert Promoter Defendants to discriminate against Plaintiffs because of their race.

C. *Claims Against the Promoter Defendants*

As discussed below, the specific incidents which Plaintiffs claim demonstrate racial discrimination by Jam and Beaver in violation of 42 U.S.C. § 1981 are not supported by evidence raising a genuine issue of material fact sufficient to survive the Defendants' summary judgment motions. Jam and Beaver were purchasers of artist talent. Plaintiffs have not shown that Jam or Beaver took any action in violation of § 1981 that affected Plaintiffs' ability to purchase artist talent. Nor have Plaintiffs provided any evidence to support their claim that Jam or Beaver were members of a conspiracy with the Booking Agency Defendants to exclude Plaintiffs from the contemporary music concert promotion market in violation of § 1985(3). Therefore, Plaintiffs have no basis for their § 1986 claim against Jam and Beaver.

1. *Jam Productions Ltd.'s Motion for Summary Judgment*

The claims of discrimination against Plaintiffs by Jam in the Amended Complaint are based on two alleged overt acts by Jam in connection with the Maxwell tours

in 1998 and 1999 and the Kenny G/Toni Braxton tour in 1997. (Am.Compl.¶¶ 87(d), 87(f).) Additionally, the Plaintiffs' Revised Memorandum of Law in Opposition to Jam's Motion for Summary Judgment claims that "Jam has never permitted a black promoter to work with it on a single white act" and that this is evidence of Jam's intent to discriminate against Plaintiffs in violation of § 1981. (Pls.' Rev. Jam. Mem., dated Mar. 12, 2003, at 6.) Also, Plaintiffs allege that Jam has participated in a conspiracy to exclude black concert promoters from promoting white and top-drawing black artists and cite Jam's alleged dominance in the Chicago area and receipt of more favorable contract terms, such as deposit and method of payment requirements in Jam's contracts, as evidence of this conspiracy to discriminate. (*Id.* at 15-17.)

Plaintiffs have not presented any direct evidence to support any of these claims. Accordingly, the Court will examine the evidence presented by Plaintiffs to determine if they have provided evidence from which it may be inferred that Jam has violated §§ 1981, 1985(3), or 1986.

(i) The 1998 and 1999 Maxwell Tours

(a) Amended Complaint Claim

Plaintiffs' claim of discrimination in paragraph 87(d) of the Amended Complaint reads as follows:

> Prior to the filing of this action, plaintiffs sought the opportunity to promote concerts given by black R & B artist Maxwell, Rolling Stone Magazine's Breakthrough Artist of 1996. The BPA contacted Jeff Frasco in or about June 1998, an agent at William Morris's Beverly Hills office, who verbally com-

> mitted to having black promoters involved in Maxwell's concerts. Shortly thereafter, however, plaintiffs discovered that promoter defendants had been retained to promote concert dates for Maxwell, and that plaintiffs were excluded. After this action was filed, defendants William Morris, BGP, Bill Silva Presents, Jam, Ltd., Cellar Door, SFX, Electric Factory, Delsener/Slater, Pace, Don Law and co-conspirator Universal Concerts excluded plaintiffs from bidding on the contracts for the promotions of the concerts on the 1999 tour given by Maxwell. These defendants, acting in concert, "engaged" a company called Magic Johnson Enterprises (MJE), named after a black basketball star, Magic Johnson, as purported co-promoter of the Maxwell tour, *in lieu* of engaging any of the plaintiffs. Neither Magic Johnson nor MJE has any experience in the concert promotion business. Defendants' conduct is a maneuver designed to create the false illusion that defendants' have engaged a black promoter on the Maxwell tour. In reality, defendants' act evidences their intention to perpetuate the conspiracy.

(Am.Compl.¶ 87(d).)

(b) Review of Facts

The Court's review of the facts in evidence as to the Maxwell tour are as follows and are undisputed unless otherwise noted. In 1998, Plaintiff Rowe sought the opportunity to promote a tour of seven or more concerts to be given by black R & B artist Maxwell, Rolling Stone Magazine's Breakthrough Artist of 1996. In or about June 1998, the Black Promoters Association

("BPA")[102] through Plaintiff Rowe contacted Jeff Frasco, an agent in WMA's Beverly Hills office, who verbally committed to having black promoters involved in Maxwell's concerts. (Rowe Jam Aff. I, Pls. Rev. Jam Ex. 1, ¶ 16.) Subsequently, on July 20, 1998, Plaintiff Rowe Entertainment wrote Mr. Frasco, stating that it was making a "firm offer" for several markets associated with the Maxwell tour. The markets and remainder of the letter read as follows:

Minneapolis, MN	$ 60,000.00/Per show
Chicago, IL	$ 100,000.00/Per show
Detroit, MI	$ 100,000.00/Per show
Washington, DC	$ 60,000.00/Per show
New York, NY	$ 125,000.00/Per show
Atlanta, GA	$ 100,000.00/Per show
Los Angeles, CA	$ 125,000.00/Per show

Production is inclusive in all offers.

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[102] The Black Promoters Association ("BPA") is a corporation organized and existing under the laws of Georgia, with its offices located in Atlanta, Georgia. (Am.Compl.¶ 17.) BPA is a "trade association of black concert promoters" organized "to promote the interests of black concert promoters, to open the industry to free competition, and to eliminate racial discrimination." (*Id.*) BPA was formed sometime between 1995 and 1997 by Plaintiffs Rowe, King and Boseman. (Joint 56.1 Stmt. ¶ 239.) The BPA operates out of Mr. Rowe's office and has no independent funding. (*Id.* ¶ 240.) There are seven members of the BPA, including Plaintiffs Rowe, Boseman and King. (*Id.* ¶ 241.) Al Haymon is a member but has attended only one BPA meeting since becoming a member. (*Id.*) Plaintiff Jones, non-party Larry Bailey and non-party Bill Washington were all members of the BPA for a period before they resigned. (*Id.* ¶¶ 247-49; L. Bailey Dep., in J.A., Vol. III, at 44, 48-49; Washington Dep., in J.A., Vol. VI, at 212.) In the period from 1995 to 2001, there were 50 black concert promoters in the United States. (Expert Report of Ali Saad, dated May, 21, 2003 ("Saad Report"), in J.A., Vol. I, at 5.)

> If any additional markets are added to the Maxwell tour, we would appreciate notification so that we may have the privilege of submitting offers for those as well. Also, please direct these offers to the responsible agent for each market.[103]

(Rowe 1998 Maxwell Offer, Pls.' Rev. Jam Mem. Ex. 1A, at 1.)

Following oral negotiations, on about September 1, 1998, Magic Johnson Productions ("MJP") received a written offer to be the tour promoter with local concert promoters for the 1998 Maxwell tour for a 50% interest in the profit or loss of each concert. (Letter from Matthew Burrows of WMA to Ervin Johnson of MJP, dated as of Sept. 1, 1998 ("Maxwell Letter from WMA to MJP, dated Sept. 1, 1998"), attached as Ex. 1E to Pls.' Rev. Jam Mem. Exs.) [104] MJP is owned by Magic John-

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[103] WMA admits that this letter was an offer for the 1998 Maxwell tour by Mr. Rowe. *See infra* note 146.

[104] Mr. Rowe's counter-affidavit, dated February 27, 2003 (Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1), is misleading. In it, Mr. Rowe states that Magic Johnson's "insertion as a co-promoter occurred only *after* I had made threats of going public regarding race discrimination in the concert industry and only *after* I had filed the instant lawsuit." (*Id.* ¶ 16 (emphasis in original).) This lawsuit was filed on November 19, 1998. Mr. Rowe's "threat of going public" was contained in a letter to Randy Hoffman, Maxwell's manager, dated September 3, 1998. (Letter from Leonard Rowe, as President of the BPA, to Randy Hoffman, dated Sept. 3, 1998 ("Maxwell Letter from BPA to Mr. Hoffman"), attached as Ex. 1G to Pls.' Rev. Jam Mem. Exs.) Mr. Rowe, however, clearly knew that MJP had been "assigned exclusive rights to promote the upcoming Maxwell tour" before August 24, 1998, because on that date he wrote a letter to Mr. Johnson congratulating him on this assignment. (Letter from Leonard Rowe, as President of the BPA, to Irvin "Magic" Johnson, dated Aug. 24, 1998 ("Maxwell Letter from BPA to Mr. E. Johnson"), attached as Ex. 1F to Pls.' Rev. Jam Mem. Exs., at 1.)

(*footnote continued*)

son, who is black. (E. Johnson Decl., McCabe Decl. Ex. 3, ¶4.) Mr. Johnson confirms that he had been "retained as the lead promoter" for a 1998 tour by Maxwell. (*Id.* ¶8.) Mr. Johnson states that in creating MJP he "assembled an experienced and capable concert promotion staff" headed by Phil Robinson, who is black and had numerous years of experience in the music industry prior to coming to MJP as manager. (*Id.* ¶6.) Earlier WMA schedules, dated August 5 and August 15, 1998, for Maxwell's 1998 fall tour, show Magic Johnson Enterprises (MJE), which is also owned by Mr. Johnson, scheduled for specific concerts with various local promoters, including Jam for October 9 and 10, 1998, at the Arie Crown Theater, an arena of 4,302 seats, in Chicago. (Pls. Rev. Jam Mem. Ex. 1A at 2, Ex. B at 1.)[105]

On August 24, 1998, Mr. Rowe, as Executive President of the BPA, wrote Mr. Johnson to congratulate him on having "been assigned exclusive rights to promote the

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Additionally, Exhibit E attached to Mr. Rowe's counter-affidavit, the Maxwell Letter from WMA to MJP as of September 1, 1998 shows that a formal retention of Mr. Johnson for the Maxwell tour occurred on or about that date. (Pls.' Rev. Jam Mem. Ex. 1E.) Exhibit A to that affidavit includes a WMA tour schedule for the 1998 Maxwell tour, which shows that "Magic" as well as certain local promoters had been scheduled for a 1998 tour by WMA by August 5, 1998, some three months before the lawsuit was filed and four weeks before Mr. Rowe's letter dated September 3, 1998 containing a "threat of going public." (WMA Tour Schedule for the 1998 Maxwell Tour, dated Aug. 8, 1998, Pls.' Rev. Jam. Mem. Ex. 1A.) Exhibit B to Mr. Rowe's counter affidavit, a WMA Maxwell tour schedule dated August 18, 1998, also lists MJE as a promoter for virtually every venue. (WMA Tour Schedule for 1998 Maxwell Tour, dated Aug. 18, 1998, Pls.' Rev. Jam Mem. Ex. 1B.)

[105] Plaintiffs' Counter Jam 56.1 Statement ¶42 misidentifies Exhibit 16 (which is the same as Pls.' Rev. Mem. Ex. 1A) as "WMA statement of 8/5/99 listing bids on the 1999 Maxwell Tour" as dated August 5, 1999 when, in fact, it is dated 8/5/98 and lists bids for the 1998 tour.

upcoming Maxwell tour" and thanking him "for offering participation to our members where [he] saw fit." (Maxwell Letter from BPA to Mr. E. Johnson, Pls.' Rev. Jam. Mem. Ex. 1F; *see also* E. Johnson Decl., McCabe Decl. Ex. 3, ¶¶ 4, 8.) This letter notes that Mr. Johnson had decided to use white promoter participation in some markets and requests that Mr. Johnson become a member of the BPA. (Maxwell Letter from BPA to Mr. E. Johnson, Pls.' Rev. Jam. Mem. Ex. 1F.) On September 3, 1998, Mr. Rowe, again on behalf of the BPA, wrote a letter to Randy Hoffman, Maxwell's manager, copied to Mr. Johnson and various newspapers and magazines, claiming that there was no black promoter involvement of the upcoming Maxwell tour and announcing the BPA's intention to stage public demonstrations in protest. (Maxwell Letter from BPA to Mr. Hoffman, Pls.' Rev. Jam Mem. Ex. 1G; *see also* E. Johnson Decl., McCabe Ex. 3, ¶ 7.) On September 8, 1998, Mr. King for First Class Productions and as Secretary of the BPA, sent another letter to Mr. Hoffman stating: "YOU NOW HAVE BUT ONE CHOICE. STOP YOUR WICKED WAYS OR FUEL OUR POWER WITH YOUR RACIST TACTICS. . . ." (Pls.' WMA Ex. 128 at 2.)

The 1998 Maxwell tour was cancelled, but a tour was rescheduled in 1999. (E. Johnson Decl., McCabe Decl. Ex. 3, ¶ 8.) Mr. Johnson states specifically that, "with respect to the 1999 Maxwell tour, MJP submitted a competitive offer to booking agency [WMA] that was accepted by Maxwell's management." (*Id.* ¶ 5.)

A letter dated June 15, 1999, to all promoters from Jeff Frasco of WMA reflects that MJP was the 1999 tour promoter.[106] Mr. Frasco instructed the promoters that all ticket advertising and ticket faces read "Magic Johnson Productions in association with [local promoter] Presents

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106 Plaintiffs present only argument to the contrary.

Maxwell." (Letter from Jeff Frasco of WMA to All Promoters, dated June 15, 1999, attached as Ex. 6 to Pls.' Counter Jam 56.1 Stmt.) In unrebutted deposition testimony, Mr. Frasco stated that Maxwell and his manager, Randy Hoffman, wanted Magic Johnson involved in the whole tour (Frasco Dep., in J.A., Vol. IV, at 97, 100) and that he had sent all the offers from promoters and expressions of interest in concerts on the tour to Mr. Hoffman (*id.* at 119). Additionally, he stated that Mr. Hoffman's "main concern . . . . was that the appropriate promoters in the local markets were Mr. Johnson's partners" (*id.* at 125) and this would include involvement for Plaintiff Fred Jones "if [Maxwell] played markets that Fred [Jones] normally plays" (*id.* at 127).[107]

Contrary to the suggestion in paragraph 87(d) of the Amended Complaint that none of the Plaintiffs were "engaged" in the 1999 Maxwell Tour, Plaintiff Sun Song (Jesse Boseman) was one of the local co-promoters who shared the proceeds with MJP of the Maxwell concert on September 8, 1999, at the Landmark Theater in Richmond, Virginia. (E. Johnson Decl., McCabe Decl. Ex. 3, ¶ 8; *see also* Letter from Berkeley Reinhold, of WMA to Phil Robinson of MJP, Jesse Boseman of Sun Song, and Brian O'Connell of Cellar Door Concerts, dated Aug. 17, 1999, (amending the contract between Maxwell, MJP and Sun Song dated July 21, 1999), in J.A., Vol. II, Ex. 35.) Also, non-plaintiff black promoters Bill Washington, Lionel Bea and Clarence Jones co-promoted, respectively nine, two and two concerts on the 1999 Maxwell tour. (E. Johnson Decl., McCabe Decl. Ex. 3, ¶ 8.)

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[107] Plaintiff Fred Jones had been scheduled as a promoter in Dallas/New Orleans on WMA's September 11, 1998 schedule for the Maxwell 1998 tour. (Pls.' Rev. Jam Mem. Ex. 1C at 2.)

(c) Plaintiffs Have Presented No Evidence Supporting Their Claims Against Jam in Relation to Maxwell

Jam has submitted sworn declarations from its two principals, Mr. Mickelson and Mr. Granat, denying Plaintiffs' claims. First, Jam claims to have done "nothing to prevent any of plaintiffs from bidding on any show, let alone the Maxwell shows in Chicago where Magic Johnson was the lead promoter." (Jam 56.1 Stmt. ¶31; Decl. of Jerry Mickelson, dated Jan. 24, 2003 ("Mickelson Decl I."), attached as Ex. 4 to McCabe Decl., ¶¶5, 9-11; Decl. of Arny Granat, dated Jan. 24, 2003 ("Granat Decl."), attached as Ex. 5 to McCabe Decl., ¶¶5, 9-11). Second, Jam denies taking "any action to prevent, exclude or hinder, in any way, any of the plaintiffs from submitting bids to promote or co-promote any of the concerts during Maxwell's 1999 concert tour." (Jam's 56.1 Stmt. ¶40; Mickelson Decl. I, McCabe Decl. Ex. 4, ¶5; Granat Decl., McCabe Decl. Ex. 5, ¶5).

Plaintiffs offer no evidence to contradict paragraph 31 of Jam's 56.1 Statement. Plaintiffs state:

> It is not true that Jam did nothing to prevent Plaintiffs from submitting bids on any show or for Maxwell's tour. Jam's participation in the conspiracy, a question of fact for the jury, resulted in the virtual exclusion of the Plaintiffs from competing in the concert promotion industry. And it is through Jam's participation in the conspiracy to exclude Plaintiffs that the Plaintiffs were repeatedly rejected over the years, and it is that repeated rejection that ultimately dissuaded the Plaintiffs from uselessly submitting bids. Therefore, Jam's participation in the conspiracy prevented Plaintiffs from submitting bids on many shows, including Maxwell.

(Pls.' Counter Jam 56.1 Stmt. ¶31, (citing Rowe Dep., in Ex. 2 to Pls.' Counter Jam 56.1 Stmt., at 1283).)

The sole evidence relied on by Plaintiffs, Mr. Rowe's deposition testimony, reads as follows:

> Q. Besides their mere presence in the industry, do you have any knowledge that they have ever acted in a way to try to prevent you from submitting bids? Once again just to clarify, besides the fact that they are part of the industry.
>
> A. Their actions is the only thing I can go by. The way that they have been able to do business and the facts and the proof is all I could go by.

(Rowe Dep., Pls.' Counter Jam 56.1 Stmt., Ex. 2, at 1283.)

Plaintiffs' response to paragraph 40 of Jam's 56.1 Statement takes the same position as their response to paragraph 31, and again cites Rowe's testimony to support their position. Mr. Rowe's testimony does not contain any specific facts, and thus is "insufficient to defeat a properly supported motion for summary judgment." *See Bickerstaff,* 196 F.3d at 452.[108]

Plaintiffs have also failed to present evidence that Jam interfered with any contractual or any potential contractual relationship of any Plaintiff in relation to the

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[108] *See also Berman v. Parco,* 986 F.Supp. 195, 200 (S.D.N.Y. 1997) ("Simple hope that a jury will not believe the testimony of defendants that has been submitted in support of a summary judgment motion will not defeat the motion where there has been no affirmative evidence submitted to counter the defendants' evidence.") (citing *Goldhirsh Group, Inc. v. Alpert,* 107 F.3d 105, 109 (2d Cir.1997) ("If all of the witnesses deny that an event essential to the plaintiff's case occurred, the plaintiff cannot get to the jury simply because the jury might disbelieve these denials. There must be some affirmative evidence that the event occurred.") (citations and quotations omitted)).

1999 (or the 1998) Maxwell tour, let alone evidence that would give rise to an inference of discriminatory intent by Jam. *See Murray,* 844 F .2d at 995. Plaintiffs have not provided any evidence that they bid on any concert on the tour in competition with Jam. The only bids Plaintiffs made were for concerts not in Jam's alleged territory. Mr. Boseman contracted for a concert in Richmond, Virginia, and Mr. Jones bid on a concert on the 1999 Maxwell tour in Nashville, Tennessee. (Letter from Fred Jones of Summitt to Jeff Frasco of WMA, dated July 23, 1999, attached as Ex. 39, in J.A., Vol. II.)[109] Plaintiffs' lack of bids precluded the possibility of Jam taking any action, in concert or otherwise, to interfere with any potential contractual relationship in connection with the Maxwell tour in violation § 1981. Plaintiffs have provided no evidence of a conspiracy against them in relation to the Maxwell tour as would be required to sustain a § 1985(3) and § 1986 claim. Thus, a rational juror could not find that Jam directly or indirectly excluded Plaintiffs from promoting or co-promoting the Maxwell tour. *See Matsushita,* 475 U.S. at 587.

(ii) Toni Braxion Tour

(a) Amended Complaint Claim

Paragraph 87(f) of the Amended Complaint reads as follows:

> Black artist Toni Braxton was promoted by plaintiffs Rowe and Boseman before she became a superstar. Once she became a star, however, plaintiffs were excluded from promoting her shows. In con-

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[109] As stated earlier, Mr. Rowe's letter of July 20, 1998 does not make a bid for a concert, but is considered as a bid for the tour of seven or more cities.

nection with a tour she was scheduled to perform with white artist Kenny G in 1997, CAA made misrepresentations to plaintiff Rowe. After Rowe made inquiry concerning plaintiffs' [sic] being able to promote her concerts, Rowe was advised by Mike Piranian of CAA in October 1996, that minimum artist guarantees of $225,000 to $275,000 per show were required from any of the plaintiffs, with a fifty (50%) deposit required upon contract signing. Plaintiffs later learned that the defendant promoters, who were actually retained to promote these concerts, were required to guarantee only $150,000 to $175,000 per show. No white promoter, including any of the promoter defendants promoting this tour, was required to submit a deposit of any more than 0-10% of the $150,000-175,000 guarantee. The effect of this discriminatory and disparate practice was intended to eliminate all black promoters, including all of the plaintiffs, from the bidding process on the Toni Braxton tour. In order for plaintiffs to have bid successfully for 10 of the Toni Braxton shows, at $250,000 per show, plaintiffs would have been required to deposit not less than $1,250,000. In contrast, defendant promoters were required to deposit either nothing or, at maximum, 10% of $175,000, or a total of $175,000 for 10 shows. The booking agency defendants William Morris and CAA (who each represented one of the two acts), thus required that plaintiffs post over $1,000,000 more than the promoter defendants for 10 shows by Toni Braxton. Plaintiffs became enraged upon learning of this treatment, and announced that they intended to picket the concert. CAA and William Morris eventually allowed plaintiffs to co-promote a few of the Toni Braxton shows with the defendant

promoters. The promoter defendants who promoted the Toni Braxton concerts were aware of the plaintiffs' inquiry, and were forced to co-promote certain shows with plaintiffs, over their objections. Certain of the promoter defendants were particularly insistent about excluding plaintiffs. Belkin, the owner of Belkin Productions, vigorously sought to exclude plaintiffs from the show in the Gund Arena in Cleveland, Ohio, even after CAA and William Morris agreed to permit plaintiffs to co-promote the show, and even though plaintiffs explained to Belkin that they had previously promoted Toni Braxton. Similarly, Don Fox of Beaver Productions refused to allow any of the plaintiffs to promote Toni Braxton in his territory, the Lake Front Arena in New Orleans, telling Rob Light of CAA that he would not allow it. Fox was able to exclude them, even as co-promoters. Rob Light communicated this refusal to Rowe. Another principal of a promoter defendant, Larry Maggot [sic] of Electric Factory, was also successful in excluding plaintiffs from even co-promoting the Toni Braxton show in Philadelphia. The other promoter defendants who were well aware of the Toni Braxton incident, and who were forced, over their objections, to co-promote 10 of Toni Braxton's shows with plaintiffs in their respective territories were Don Law (Boston, MA); DeCesare-Engler (Pittsburgh, PA); Contemporary Productions (St.Louis, MO); Fantasma (Florida); Cellar Door (Detroit); Jam Ltd. (2 shows in Chicago); Concert/Southern Promotions (Atlanta); Delsener/Slater (New York); and Belkin Productions (Cleveland).

(Am.Compl.¶ 87(f).)

(b) Review of Facts

The evidence presented relevant to the 1997 Kenny G/Toni Braxton tour is as follows. As to the claimed representation of Ms. Braxton prior to her 1997 tour with Kenny G, Plaintiffs have provided little evidence showing that they in fact ever served as "promoters" for Toni Braxton. Mr. Rowe testified that, in 1995, Al Haymon was the lead promoter for Ms. Braxton's concerts and that Mr. Rowe was a "co-promoter." (Rowe Dep., in J.A., Vol. VI, at 778-79.) Mr. Rowe states that in 1995, he worked with Mr. Haymon to involve Ms. Braxton on the Frankie Beverly tour. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶214; Pls.' Stmt. of Contested Material Facts Pursuant to Local Rule 56.1, dated Apr. 25, 2003 ("Pls.' CAA 56.1 Stmt."), ¶319.) Mr. Rowe also stated that he provided advertising for part of that tour. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶214) Mr. Boseman testified that he was involved in providing advertising for that tour. (Boseman Dep., in Pls.' CAA Dep. Tr., Vol. I, at 1190-91; Pls.' CAA 56.1 Stmt. ¶319.)

As to the 1997 Kenny G/Braxton tour, Mr. Rowe states, in his affidavit dated April 21, 2003, submitted in support of Plaintiffs' Counter Jam 56.1 Statement, that:

> [i]n late 1996,[110] I learned that an upcoming 1997 Toni Braxton/Kenny G tour had been sold to dominant white promoters without the knowledge and resultant opportunity for the black promoters to participate.[111] . . . . When I called CAA about it to

[110] In his deposition on August 14, 2001, Mr. Rowe placed the time of the call in October or November 1996. (Rowe Dep., in J.A., Vol. VI, at 1384.)

[111] In his deposition, Mr. Rowe states he called Mr. Piranian because he had received phone calls from black promoters saying that they had been excluded from the Kenny G/Braxton tour and he was

protest and insist on black promoter involvement, Mike Piranian told me the minimum guarantee required to promote Toni Braxton and Kenny G would be between $225,000-$275,000 and the usual 50% deposit. The price CAA quoted was inflated beyond reason and it was apparent that I and the other members of the BPA were being shut out of a fair bidding process on the basis of our race. Because of this exclusionary tactic, I threatened to protest if black promoters were not allowed to participate. I communicated this to CAA and drew up fliers that I planned to use if we were not included. I sent those fliers to CAA in late 1996. In early January, only after and on account of my threats to make the discrimination public, were we granted a 33 1/3% interest in nine cities out of approximately fifty on the 1997 Toni Braxton tour. A tenth show

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calling on their behalf. (Rowe Dep., in J.A., Vol. VI, at 1377.) He states that the black promoters were not invited to bid or able to participate in the bidding process. (*Id.* at 1379.) However, Mr. Rowe contradicts his claim of no opportunity to bid in this same deposition when he states that after his initial conversation with Mr. Piranian, he spoke with Mr. Haymon about the quoted prices, and they did not discuss making a counteroffer because "that's what the promoter was paying." (*Id.* at 1384.)

In his affidavit, dated April 24, 2003, submitted in Opposition to Defendant CAA's Motion for Summary Judgment, Mr. Rowe also contradicts his deposition testimony that black promoters were not invited to bid or able to participate in the bidding process. He states:

> In 1996, Al Haymon called me and told me that Kenny G and Toni Braxton were going to tour in 1997. Mr. Haymon told me that the guarantee was about $250,000 to $275,000 depending on the city, and that it was his opinion that the guarantee was too high. I then called Mike Piranian, the responsible CAA agent for the tour, to discuss the possibility of involvement in the tour.

(Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 215.)

> was subsequently added to the Chicago date because the first one had sold out. Jam insisted that this second show should not be subject to the same agreement which forced it to co-promote the first Ms. Braxton date with me. In the end, Jam was forced to partner with me on both shows, but only after I threatened to go to court and ask a Judge to settle the issue. I thereafter learned that white promoters promoted Toni Braxton/Kenny G for minimum guarantees of between $150,000-$175,000, far less than the falsely inflated figure that I had been quoted.[112]

(Aff. of Leonard Rowe, dated Apr. 21, 2003 (Rowe Jam Aff. II"), attached as Ex. 8 in Pls.' Counter Jam 56.1 Stmt., ¶ 29.)

It is not disputed that the minimum artist guarantees of $225,000 to $275,000 plus the usual 50% deposit were the early bid requirements. These guarantee amounts were the amounts Kenny G's manager, Turner Management, asked CAA to request. (Phillips Dep., in J.A., Vol. V, at 49; Light Dep., in J.A., Vol. V, at 475.)[113]

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[112] According to his deposition testimony, Mr. Rowe learned that the Kenny G/Braxton dates were selling for much less than the $225,000 to $275,000 Mr. Piranian originally quoted him after he had spoken with Mr. Piranian for the first time and spoke with Mr. Haymon about those terms, but before threatening to protest. (Rowe Dep., in J.A., Vol. VI, at 1386.) Thus, he did not learn of the "minimum guarantees of between $150,000 to $175,000 after his protest or after Jam allowed him to partner on the Kenny G/Toni Braxton shows. Mr. Rowe's deposition is the evidence with conclusory effect on points of difference. *Bickerstaff*, 196 F.3d at 455.

[113] Corroborating these early terms, CAA presents contracts showing that on August 16, 1996, Radio City Music had agreed to promote six Kenny G/Braxton concerts for a per show guarantee of $280,000, revised by Dennis Turner, Kenny G's manager, in January 1997 to $232,597 per show. (Decl. of Robert Light, dated May 20, 2003 ("Light Decl. II"), Exs. 1-4.) On October 25, 1996, Nederlan-

According to Rob Light of CAA, after Mr. Rowe sent a letter to Kenny G's manager, with copies sent to leading black activist figures, threatening to boycott and picket the Kenny G/Braxton shows, Kenny G's manger asked Mr. Light to attempt to fix the situation. (Light Dep., attached as Ex. 13 to Pls.' Counter Jam 56.1 Stmt., at 487-89.) Mr. Light testified that when he spoke to Mr. Rowe, Mr. Rowe complained that he had not being given a fair opportunity to bid, that he had been given an unjustifiably high price, and that he had later found out that other promoters had paid less. (*Id.* at 487-88.) Mr. Light testified that he told Mr. Rowe, "Leonard, you need to put in offers. No matter what Mike quoted you, you know you are not precluded from putting in any offer that you want to put in." (*Id.* at 488.) Mr. Light also testified that Mr. Rowe stated that he felt he was entitled to serious consideration for participation based on his prior involvement in Toni Braxton concerts.[114] (*Id.*) Mr. Light stated that he responded "that it was a Kenny G tour, not a Toni Braxton tour," and that Rowe should know "from his experience that there is no precedent for the support act dictating who the promoter was," and that the manager of the headliner chooses the promoter. (*Id.*)

Mr. Light further testified that because Kenny G's manager was afraid Kenny G would be hurt by the protests, Mr. Light negotiated a written settlement with Mr. Rowe and Mr. Boseman for a one-third promoter participation in nine markets for shows already con-

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der Theatres agreed to a minimum artist guarantee of $225,000 and a 90/10 artist split for the auditorium in Anaheim, California. (Light Decl. I Ex. 5.)

[114] As stated *supra* p. 73, Mr. Rowe's and Mr. Boseman's claims of having promoted Toni Braxton previously were based on having been employed in Mr. Haymon's promotion of Toni Braxton.

firmed to certain local promoters. (*Id.* at 489-90, 493; Letter Agreement from Mr. Light to Mr. Rowe and Mr. Boseman, dated Jan. 6, 1997, attached as Ex. 14 to Pls.' Counter Jam 56.1 Stmt.) Mr. Light's letter had been pre-approved by Kenny G, Toni Braxton and their respective managers. (Light Dep., Pls.' Counter Jam 56.1 Stmt. Ex. 13, at 497.) Thereafter, when Kenny G decided to do a second show in Chicago, a dispute arose between Mr. Light and Mr. Rowe as to whether the letter agreement of January 6, 1997, gave Plaintiffs any right to participate in the second concert. Mr. Rowe then threatened to go to court for his one-third participation, and Mr. Light agreed that Plaintiffs would get a one-third participation in the second show. (Rowe Dep., McCabe Decl. Ex. 6, at 1418-20; Boseman Dep., McCabe Decl. Ex. 8, at 1016-17.) Mr. Rowe does not dispute Mr. Light's testimony on this subject.

(c) Plaintiffs Have Presented No Evidence Supporting Their Claims Against Jam in Relation to Toni Braxton

There is no evidence in the record after oral discovery and exhaustive document discovery—including review of the computer files and e-mails retrieved from the computer hard drives of CAA, WMA, Renaissance and Jam—of Jam taking any action to exclude Plaintiffs or other black promoters from promoting concerts in Chicago, including the 1997 Kenny G/Toni Braxton tour. Plaintiffs have also failed to present evidence of any interference with any contractual relationship by Jam in relation to the 1997 Kenny G/Braxton tour, let alone evidence that would give rise to the inference that there was interference due to discriminatory intent. *See Murray*, 844 F.2d at 995. Paragraph 42 of Plaintiffs' Counter Jam 56.1 Statement states that Mr. Boseman submitted a bid

for a concert in an unspecified city on the Kenny G/Braxton Tour, citing Mr. Boseman's deposition as support for this assertion. (Pls.' Counter Jam 56.1 Stmt. ¶42 (citing Boseman Dep., Pls.' Jam 56.1 Stmt. Ex. 9, at 916-17, 1034).) Mr. Boseman testified, however, that he had made an "inquiry about playing some Kenny G dates, and "we eventually wound up with some dates for Kenny G" and Toni Braxton through conversations with Mr. Light and Mr. Phillips. (Boseman Dep., Pls.' Counter Jam 56.1 Stmt. Ex. 9, at 916-17.) As Mr. Light testified, these conversations took place after the concert had been confirmed to Jam. The contract between Jam and Turner Management for the 1997 Kenny G/Braxton concert in Chicago is dated November 25, 1996. (Contract between Jam and Turner Management for a Kenny G/Braxton concert on Jan. 18, 1997 on a CAA form, dated Nov. 25, 1996, attached in Ex. A to Decl. of Pierre Armand, dated May 23, 2003 ("Armand Decl."), attached to Light Decl. II.) Also, Mr. Boseman in his testimony did not state that he placed a bid or offer on the 1997 Kenny G/Braxton tour, but rather responded to the question "Besides the Kenny G and Toni Braxton tour, have you ever submitted a bid or put an offer in on a show that Jam promoted?" with a "No." (*Id.* at 1034.) Plaintiffs do not show that this testimony by Mr. Boseman, which Plaintiffs assert relates to a bid for the Kenny G/Braxton tour, refers to anything more than the discussion with Mr. Light settled by the January 6, 1997 letter agreement. It does not state Mr. Boseman submitted a bid.

Nor can Plaintiffs complain that they were unaware of the opportunity to bid, or that Jam in any way prevented them from learning of any bidding opportunity. Although Mr. Rowe presents contradictory testimony within his own deposition, the evidence indicates that he, and the

black promoters he claims to represent, had an opportunity to bid. The beginning of Mr. Rowe's deposition testimony on this issue reads as follows:

> Q. So your position at the time, I want to be clear, was not that you had to participate in the tour, but that you simply wanted an opportunity to bid against others, is that correct?
>
> A. We thought we should have received that opportunity, yes.

(Rowe Dep., in J.A., Vol. VI, at 1380.)

Mr. Rowe, however, later states that he was told of the parameters requested by Mr. Piranian ($225,000 to $275,000 and a 50% deposit). (*Id.* at 1382.) Mr. Rowe then testified that he and Mr. Haymon discussed the requested terms and found them "too risky" and decided to "let it go for the time being." (*Id.* at 1383.) Thus, Mr. Rowe acknowledged that he had the opportunity to bid.

Plaintiffs have also presented no evidence that Jam interfered with the Plaintiffs' co-promotion of Toni Braxton. Mr. Rowe asserts that Jam was forced over its objections to co-promote with Plaintiffs due to the agreement between Mr. Light and Plaintiffs and that "Jam insisted that the second show should not be subject to the same agreement." (Rowe Jam Aff. II, Pls.' Counter Jam 56.1 Stmt. Ex. 8, ¶21).[115] These are only Mr. Rowe's conclusions. Plaintiffs cite no evidence indi-

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[115] Although Mr. Rowe states he "was permitted to sharecrop" and did nothing to promote the Chicago Kenny G/Braxton show (Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶22), Mr. Boseman testified that he also shared in the co-promotion fee and that he did make several calls to Chicago radio stations on behalf of the Braxton concert (Boseman Dep., McCabe Decl. Ex. 8, at 1015). Plaintiffs received 1/3 of the promoter's profits on both shows promoted by Jam. (Rowe Dep., McCabe Decl. Ex. 6, at 767.)

cating that Jam played any role in the later negotiations between CAA and Plaintiffs regarding co-promotion, but rather argue that "a jury may well conclude, that Jam would not give up a piece of a concert for which the work was already done to a promoter with whom it had never co-promoted without being told the reason." (Pls.' Counter Jam Stmt. 56.1 ¶¶ 36, 39.) Plaintiffs cite nothing in Mr. Rowe's affidavit and no testimony by Rob Light of CAA, by Jam employees, or by anyone else, to show that Jam objected to either of the co-promotions. Mr. Rowe and Mr. Boseman have testified that Jam tried to "exclude" Plaintiffs when Kenny G decided to do a second show in Chicago two months after the first show, but their conversations were solely with Mr. Light. (Rowe Dep., McCabe Decl. Ex. 6, at 1418-20; Boseman Dep., McCabe Decl. Ex. 8, at 1016-17.) The cited testimony of Mr. Rowe and Mr. Boseman contains no reference to the Plaintiffs or Mr. Light discussing the second show with Jam.

Even if one were to speculate (1) that Mr. Light would not have reached an agreement with Mr. Rowe and Mr. Boseman with respect to the second show scheduled for Chicago without discussion with Jam and (2) that Jam objected to the Plaintiffs being made co-promoters for the second show, the record is clear that the letter agreement of January 6, 1997 (Pls.' Counter Jam 56.1 Stmt. Ex. 14) was entered into when all parties were of the belief there would be only one show in Chicago. The letter agreement of January 6, 1997, also provides that Plaintiffs "will not have any claim for involvement in any future Kenny G dates in this tour." (*Id.*) Accordingly, if there were evidence that Jam tried to exclude Mr. Rowe and Mr. Boseman from the second show, the dispute over the meaning of the January 6, 1997 letter would, at most, be a bona fide contract dispute, a matter

of contract interpretation. Thus, if Jam had objected, Jam would have been acting in its own economic interest, which would be a legitimate nondiscriminatory reason for its actions. *See Raytheon,* 540 U.S. at 50 n. 3.

(iii) Other § 1981 Claims by Plaintiffs

Plaintiffs claim that an inference of an intent to discriminate can be drawn against Jam because the evidence shows that Jam has never co-promoted a white act with a black promoter prior to the filing of this lawsuit. (Pls.' Rev. Jam Mem. at 5 (citing Granat Dep ., Pls.' Rev. Jam Mem. Ex. 2, at 55, 75-79).) Thus, Plaintiffs claim that this pattern and practice would allow a jury to infer discrimination, because "the disparity has no reasonable business explanation." (Pls.' Rev. Jam Mem. at 6 (citing *Sweat v. Miller Brewing Co.,* 708 F.2d 655, 658 (11th Cir.1983)).)[116] Mr. Granat's testimony, however, does not support Plaintiffs' assertion because he testified that he believed that he has co-promoted acts with several black promoters whom he named (Granat Dep., Pls.' Rev. Jam Mem. Ex. 2, at 34), but was unable to name any white artists involved (*see, e.g., id.* at 76 (responding to the question of whether he had ever co-promoted a white artist with Al Haymon with "You know I think I did, and I can't remember the name")). Mr. Granat's testimony is not adequate support for Plaintiffs' assertion

[116] Although Plaintiffs state that a court may draw an inference of pretext from more general comparative evidence, citing *Sweat v. Miller Brewing Co.,* 708 F.2d 655, 658 (11th Cir.1983) and *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 580 (1978), those cases relate to the hiring of a workforce required to perform a service, not a situation where the promoter already has the work force necessary to provide the service and only enters into co-promotion contracts, which reduce its profit, in order to avail itself of knowledge or expertise which it does not possess to promote a particular concert.

that Jam has never co-promoted a white act with a black promoter. Additionally, Mr. Mickelson, Mr. Granat's partner, testified that he believed that Jam had used Jerry Dickerson, a black promoter, in a city other than Chicago, to co-promote a white act or acts. (Mickelson Dep., Pls.' Rev. Jam Mem. Ex. 9, at 112-13.) He testified, "I am pretty sure that we have copromoted every black show we have ever done with a black promoter."[117] (*Id.* at 111.) Mr. Mickelson also testified that "[w]e'll copromote with anybody, regardless of what race they are if they bring us something that we don't already have. So if it is in a market that we are not in or that we don't regularly like to go in and they have an expertise and a knowledge that we don't have, we would be glad to work with them."[118] (*Id.* at 111.)

Jam submitted an affidavit dated December 4, 2000, long before this motion, from a black promoter, Al Kennedy of Dance Contests International, with his letter dated January 27, 1999 attached, which contains a list of many artists whom he has co-promoted with Jam, including Rosie O'Donnell and the Average White Band. (Letter from Al Kennedy to Arny Granat & Jerry Michaelson [sic], dated Jan. 27, 1999, attached as Ex. 1 to Aff. of Al Kennedy, dated Dec. 4, 2000, attached as Ex. 3 to Decl.

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[117] In their brief, Plaintiffs state that "Jam has co-promoted every black act it has ever done with black promoters," (Pls.' Rev. Jam Mem. at 6 (citing Dep. of Jerry Mickelson, undated ("Mickelson Dep."), Pls.' Rev. Jam Mem. Ex. 9, at 111) but then, only a page later in their brief, inconsistently state that "Jam's refusal to co-promote black acts with black promoters except under threat of public outcry (one of many statements not supported by the evidence) is evidence of Jam's intent to discriminate against the Plaintiffs" (*id.* at 7).

[118] A co-promoter's familiarity with a particular genre of music, e.g., R & B, hip hop, or pop can lead to an agreement to co-promote. (Joint 56.1 Stmt. ¶41.)

of James D. Roberts, Esq., dated Mar. 13, 2003 ("Roberts Decl.").) Plaintiffs' claim that Jam has never used a black promoter for concerts by white artists is not supported by any evidence, and no inference of discrimination by Jam can be drawn from this unsupported assertion.

(iv) Claims Against Jam Under § 1985

Jam states that it "has not tried to exclude black concert promoters from promoting concerts for white and top-drawing black artists" (Jam's 56.1 Stmt ¶43; (citing Mickelson Decl. I, McCabe Decl. Ex. 4, ¶10; Granat Decl., McCabe Decl. Ex. 5, ¶10), and "has not participated in any conspiracy to exclude black concert promoters from promoting concerts for white and top-drawing black artists" (*id.* ¶44 (citing Mickelson Decl. I, McCabe Decl. Ex. 4, ¶11; Granat Decl., McCabe Decl. Ex. 5, ¶11).) Plaintiffs counter these statements by claiming that "Jam's participation in the conspiracy [is] a question of fact for the jury based on the totality of evidence," and that this evidence includes Jam's "virtual exclusivity in the Chicago territory [citing Pls.' Rev. Jam 56.1 Stmt. ¶¶2-6] and the lack of competition in the promotion industry [citing R. Johnson Aff., Pls.' Counter Jam. Ex. 15, ¶5[119]]." (Pls.' Counter 56.1 Stmt. ¶44.) Also, as evidence supporting the conspiracy, Plaintiffs state that "Jam was automatically awarded contracts in its territory free from competition [citing Pls.' Rev. Jam 56.1 Stmt. ¶¶2-6; Rowe Dep., Pls.' Counter Jam 56.1 Stmt. Ex. 2, at 1283]," and was "awarded more favorable terms than those which were made available or known to

[119] Paragraph 5 does not relate to the claim made by Plaintiffs here. Paragraph 3, however, relates to the claimed competiveness of the market.

the Plaintiffs [citing Pls.' Rev. Jam 56.1 Stmt. ¶¶ 14-21]."[120] (*Id.*)

The evidence cited by Plaintiffs to support their allegation of Jam's virtual exclusivity in the Chicago territory does support this position. The number of years Mr. Granat has been a promoter, the information in paragraph 2 of Plaintiffs Revised Jam 56.1 Statement, and the claimed raw numbers of shows that Jam has promoted, the information in paragraphs 3 and 4 (which is disputed by Jam), cannot raise any inference of dominance without further information. As stated previously, the Pollstar extrapolation, which Plaintiffs offer as support for their claims of Jam's virtual exclusivity in Chicago in paragraph 5, is not supported by expert testimony and is apparently incomplete since Mr. Haymon testified he did not submit his concert results to Pollstar. (Haymon Dep., in J.A., Vol. IV, at 38.) The handwritten notes, which Mr. Rowe states were written by CAA agent Carol Kinzel, cited as evidence of a conspiracy to have Jam dominate the Chicago area in paragraph 6, also includes "Joseph Entertainment" under the heading of Chicago, Illinois. Furthermore, although Mr. Rowe claims that these notes were written by Ms. Kinzel (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 10), Ms. Kinzel has submitted a declaration, in which she states that these notes are not her handwriting (Decl. of Carole Kinzel, dated May 20, 2003 ("Kinzel Decl."), attached to Light

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[120] Plaintiffs also assert that the evidence shows the Booking Agency Defendants and the Promoter Defendants have conspired to exclude black promoters from the Promoter Defendants geographically assigned territories. (Pls.' Counter Jam 56.1 Stmt. ¶ 44 (citing R. Johnson Aff., Pls.' Counter Jam. Ex. 15, ¶¶ 3,5).) As stated *supra* p. 32 in the antitrust section, this affidavit does not support the allegation of territorial allocation or a conspiracy to exclude by the Promoter Defendants.

Decl. II, ¶ 4). Plaintiffs have offered nothing to contradict her statement, nor anything to show that Mr. Rowe is familiar with her handwriting. Furthermore, his testimony about her handwriting is conclusory and is not admissible evidence.

Even assuming Plaintiffs could show Jam's "virtual exclusivity," they have not provided any evidence linking this alleged dominance to a conspiracy. Plaintiffs provide no evidence showing that Jam's alleged dominance as a promoter in Chicago is a result of discrimination rather than due to legitimate business reasons, e.g., trust in promoter's experience in promoting concerts, ability in advertising and marketing concerts, the promoter's financial viability, and the promoter's exclusive arrangements for venue. (*Cf.* Gonzalez Report, Pls.' Rev. Jam Mem. Ex. 10, ¶ 12; Kapp Dep., Pls.' Joint Mem. Ex. 12, at 231-36.)

As to the other cited evidence of Jam's dominance, in paragraph 3 of Mr. R. Johnson's affidavit, he states, "When a white artist represented by WMA wanted to have a concert in one or more cities, or stage a nationwide tour, there was no competitive 'bidding' process. . . . Agents, who were also organized by territory, instead were instructed to book their dates through the dominant promoter in his or her market." (R. Johnson Aff., Pls.' Counter Jam. Ex. 15, ¶ 3.) Mr. R. Johnson does not mention Jam, or Jam's alleged virtual exclusivity in the Chicago territory.

Plaintiffs also cite paragraph 5 of Mr. Johnson's affidavit, discussing the division at WMA of white and black acts, and again, Mr. Johnson makes no reference to Jam or any other particular promoter. Additionally, as stated previously, Mr. Johnson is not an expert and his knowledge is limited to his personal knowledge of actions taken by WMA booking agents from 1982 to

1986, well before the statute of limitations for this action.

As to the claim that Jam was awarded contracts in its territory free from competition, paragraphs 2 through 6 of Plaintiffs' Revised Jam 56.1 Statement cite no evidence in support of this allegation and page 1283 of Mr. Rowe's deposition testimony does not contain any evidence indicating that Jam was awarded contracts free from competition.

Furthermore, Plaintiffs' claim that Jam was awarded contracts with terms that were not made available or known to Plaintiffs. However, the evidence they cite to support this claim, paragraphs 14 through 21 of Plaintiffs Revised Jam 56.1 Statement, (Pls.' Counter Jam 56.1 Stmt. ¶¶ 44-45), does not support their claim of a conspiracy to discriminate. The cited paragraphs of the Plaintiffs' Revised Jam 56.1 Statement maintain that: (1) the industry standard requires a promoter to deposit 50% of the guarantee upon contract (citing Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶ 18;[121] Gonzalez Report, Pls.' Rev. Jam Mem. Ex. 10, ¶ 5); (2) the industry standard is to deposit funds by cashiers check or money order (citing Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶ 18; Pls.' Rev. Jam Mem. Ex. 15 (containing contracts with preprinted language requiring a deposit of 50% of the artist' guarantee); and (3) Jam's contracts required no deposit or a 10% deposit or other more

[121] Plaintiffs have submitted no evidence demonstrating that Mr. Rowe is an expert in the concert promotion business, and when he speaks on matters, such as the industry standard, Plaintiffs have failed to demonstrate that he has sufficient qualifications to state these conclusions. These statements are inadmissible under the Federal Rules of Evidence. *See* Fed.R.Evid. 602.

favorable terms (citing Pls.' Rev. Jam Mem. Exs. 15, 16, 19, 23, 25).[122]

Even assuming that Plaintiffs' allegations are true, Jam's contracting on more favorable terms than those made available or known to Plaintiffs is not evidence of a conspiracy to exclude Plaintiffs based on race without additional evidence which Plaintiffs have failed to submit. Receipt of more favorable terms would affect any white promoters in competition as much as black promoters. Furthermore, although a booking agency may negotiate the terms of a contract with a promoter, usually an artist or an artist's manager retains ultimate authority to accept or reject these terms. (Gonzalez Report, J.A., Vol. I, ¶ 7.) Additionally, in this commercial context, the most prominent promoter is likely to have demonstrated to the booking agent or artist's manager to have expertise in advertising and marketing concerts, to have demonstrated financial integrity and, as acknowledged in the Amended Complaint paragraph eighty-two, to have exclusive venue arrangements, all explanatory of favorable terms obtained. (Kapp Dep., Pls.' Rev. Jam Mem. Ex. 4, at 245; Gonzalez Report, Pls.' Rev. Jam Mem. Ex. 10, ¶ 12.)

Plaintiffs claim to have raised an inference of race discrimination based on examples of Jam's contracts as compared to Mr. Haymon's contracts. (Pls.' Rev. Jam Mem. at 17.) Plaintiffs' example of a Jam contract for

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[122] In paragraph 87(f) of the Amended Complaint, Plaintiffs claim that in regards to the 1997 Kenny G/Braxton concert, "No white promoter, including any of the promoter defendants promoting this tour, was required to submit a deposit of any more than 0-10% of the $150,000-1575,000 guarantee." CAA has submitted copies of contracts, however, which show that the promoters, including JAM, agreed to pay a deposit of 50% of the guarantee. (Armand Decl., Light Decl. II, Ex. A.)

two Lauryn Hill concerts (Pls.' Rev. Jam Mem. Ex. 30 (which is the exact same as Ex. 17)) contains alterations reflecting Jam's counter offers as to amounts of guarantee, deposit and terms for payment. (Mickelson Decl. II, Roberts Decl. Ex. 1, ¶¶ 5-17 (describing the process for negotiating a contract between Jam, the booking agencies and the artists and stating that Jam's proposed changes to a draft contract are accompanied by a box stating "initial here" to indicate where changes are located, similar to those in Exhibit 30).)[123] Plaintiffs' copies of three Haymon contracts for Lauryn Hill concerts (Pls.' Rev. Jam Mem Ex. 14) do not reflect any of Mr. Haymon's proposed alterations to the draft contract and are not signed by any of the parties. Thus, the exhibits are at different points of contract negotiations. In any event, it is not an act of race discrimination to negotiate and obtain more favorable contract terms in an offer than the "industry standard."

Furthermore, comparing the terms offered to Jam (*id.* Ex. 30) and Mr. Haymon (*id.* Ex. 14) for the Lauryn Hill concerts in different cities shows that the booking agency, Defendant WMA, proposed a deposit of 50% of the guarantee on those contracts. Since both Mr. Haymon (black) and Jam (white), both of whom are very successful promoters, were offered the same deposit as a percent of guarantee, an inference of a conspiracy with the booking agency to discriminate against black promoters on the basis of race by requiring more onerous terms from them is not supported by the evidence.

Review of Plaintiffs' selected examples of other Jam contracts (Pls.' Rev. Jam Mem. Ex. 15) shows that Jam was required to pay no deposit or 10% of its guarantee for some concerts due to its rejection of a 50% deposit

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123 Also, this contract form is only signed by Jam, not the artist Lauryn Hill, and therefore, does not reflect the final terms.

term in the proffered contract and sometimes because the performances were by supporting acts for the headline act. Many such contracts also allow payment by company check and are for concerts in cabarets or small theaters or are for guest appearances. This contrasts with the 50% guarantee to be made by certified check or cash, which Plaintiffs Rowe (Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶ 18) and Boseman (Boseman Aff., Pls. Rev. Jam Mem. Ex. 8, ¶ 14), assert they were uniformly required to deposit by the booking agents.[124] Mr. Boseman and Mr. Rowe, however, have not submitted evidentiary support for the assertion that they make bids on individual concerts or that they have the same track record for successful concerts, connections with venues and financial integrity as Jam.

In short, Plaintiffs have not shown a tacit agreement between Jam and the Booking Agency Defendants to give Jam more favorable terms than black promoters as claimed by Plaintiffs. They have merely shown that Jam is often able to negotiate more favorable terms than the Plaintiffs have been offered.

(v) Plaintiffs Have Presented No Evidence Supporting Their Claim that Jam Violated § 1986

Plaintiffs have not provided sufficient evidence for their § 1985 conspiracy claim, as required to bring a claim for a violation of § 1986. 42 U.S.C. § 1986. Even if Plaintiffs had provided evidence of a conspiracy in violation of § 1985, the evidence presented does not

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[124] Among the contracts in Exhibit 15, the Court finds a contract on a CAA form between Wonder Production (Stevie Wonder) and Haymon Entertainment/Jam Productions, Ltd., dated December 15, 1994, requiring each promoter to pay a 25% deposit. Stevie Wonder is a major black artist.

show that Jam had any knowledge of the alleged conspiracy to discriminate against black promoters. Thus, this claim must fail. *See Buck v. Bd. of Elections of City of New York,* 536 F.2d 522, 524 (2d Cir.1976) (holding that defendants' knowledge of allegedly discriminatory acts is a prerequisite to suit under § 1986).

Jam states, "Before the commencement of this litigation, Jam did not have any knowledge of the conspiracy alleged by plaintiffs." (Jam 56.1 Stmt. ¶ 35 (citing Mickelson Decl. I, McCabe Decl. Ex. 4, ¶¶ 6-8; Granat Decl., McCabe Decl. Ex. 5, ¶¶ 6-8).) Furthermore, "Jam did not attend a public meeting or read an article in which plaintiffs' [sic] claimed the existence of an alleged conspiracy." (Jam 56.1 Stmt. ¶ 37 (citing Mickelson Decl. I, McCabe Decl. Ex. 4, ¶ 8; Granat Decl., McCabe Decl. Ex. 5, ¶ 8).) Plaintiffs argue that the truth of the declarations of Mr. Mickelson and Mr. Granat is a question of fact for the jury, but cite no evidence contradicting these declarations or from which an inference of knowledge of the conspiracy by either declarant or Jam can be drawn.[125] (Pls.' Counter Jam 56.1 Stmt. ¶¶ 35, 37.)

Plaintiffs' response argues that "[a] jury may attribute knowledge [by Jam] of the Plaintiffs' allegations of conspiracy to Jam due to the publication in major and widely distributed publications, namely, "Black Promoters Say They' e Excluded From Top R & B Gigs,"

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[125] Plaintiffs also repeat the claim that Jam dominates the Chicago market and is awarded contracts automatically, and thus, a jury could conclude that Jam knew of the conspiracy. As stated *supra* pp. 83- 86, there is no evidence of Jam's dominance or Jam's being automatically awarded contracts. Nor do Plaintiffs offer any evidence that Jam knew that it was automatically awarded contracts or that the contracts were awarded free from competition. Also, Plaintiffs do not cite to evidence explaining how the awarding of contracts to Jam by the booking agencies would give Jam knowledge of a conspiracy to exclude Plaintiffs due to their race.

Billboard Magazine, June 21, 1997, and "Black Music Promoters Being Muscled Out of the Business by Whites," Jet, April 5, 1979. (*Id.* ¶¶ 35, 37, Exs. 10, 11.) The 1997 article in Billboard Magazine states that Plaintiff Rowe and the BPA assert that WMA and CAA discriminate against black promoters when black acts become famous R & B acts. (J.R. Reynolds, "Black Promoters Say They're Excluded from Top R & B Gigs," Billboard, June 21, 1997, attached as Ex. 10 to Pls.' Counter Jam 56.1 Stmt.) The 1997 article does not contain any conspiracy allegation, nor does it claim that white concert promoters take part in the discrimination. The 1979 article in Jet cites Mr. Rowe, stating that black performers "usually have White managers who owe other White promoters big favors. So when the manager's Black group gets big, the White promoter comes to collect." The article also quotes Quentin Perry, a black promoter, as stating, "Black performers defect to the White promoters . . . . because 'there is some belief white folk can do it better'. . . ." ("Black Music Promoters Being Muscled Out of the Business by Whites," dated Apr. 5, 1979, attached as Ex. 11 to Pls.' Jam Counter 56.1 Stmt.) The article does not allege that white promoters are members of a conspiracy with booking agencies to discriminate against black promoters. No reasonable jury could infer from either of those articles that Jam was aware that Plaintiffs' were alleging a conspiracy between the booking agents and white promoters as argued by Plaintiffs in this case.

There is no evidence that Jam knew that Plaintiffs were claiming the promoters were part of a conspiracy with the booking agents to discriminate against the Plaintiffs. To further support this lack of knowledge of the alleged conspiracy, Jam points out that Mr. Rowe acknowledged in his deposition testimony that his "let-

ter-writing campaign to convince the industry to break the alleged conspiracy was directed to the booking agencies, not to Jam or the other concert promoter defendants, because it is the booking agencies who control the selection of promoters." (Jam 56.1 Stmt. ¶38 (citing Rowe Dep., McCabe Decl. Ex. 6, at 1285).)

> Q. Did you write any letters to Beaver, Jam or Fantasma?
>
> A. No, I didn't write any letters to any promoters because the agencies was the one I figured could help straighten this situation out because the agency serves as the gatekeepers. They are the liaison between the promoters and the artists, the selling of the artist, and I figured if I could get the agency to straighten out their conduct, the conduct of all would probably be straightened out.

(Rowe Dep., McCabe Decl. Ex. 6, at 1285.)

Plaintiffs respond to paragraph 38 of Jam's 56.1 Statement, citing Mr. Rowe's further testimony, which states:

> Q. Why didn't you write letters to the promoters, then?
>
> A. Well, because the promoters was reaping the benefits of this conspiracy and the discriminating, and they wasn't about to give that up. They was in Disneyland with it. It was great to them. They didn't have to worry about bidding against black promoters.
>
> They didn't have to worry about sharing with black promoters. If a black artist came out that was a huge ticket-seller, they didn't have to worry about having a history with it. The agencies automatically gave it to them. They loved that. They loved it.

(*Id.* at 1286.)

This testimony by Mr. Rowe consists of purely conclusory statements and is not evidence admissible to show that Plaintiffs put Jam on notice of their claims that there was a conspiracy to exclude Plaintiffs from promoting or co-promoting concerts. As to Jam's knowledge of the Toni Braxton incident or any other claim of conspiracy, paragraph 29 of Jam's 56.1 Statement states, "There is no testimony from the plaintiffs, that they discussed with Jam their belief that there existed some 'conspiracy' to exclude black promoters from promoting, whether in connection with the Maxwell tour, the Toni Braxton concerts, or any other concert or setting." (Jam 56.1 Stmt. ¶ 39 (citing Rowe Dep., McCabe Decl. Ex. 6, at 765-66, 1279-83; Boseman Dep., McCabe Decl. Ex. 8, at 1011-15).) Similarly, in paragraph 36 of Jam's 56.1 Statement, Jam's owners assert that "Jam did not have any conversations with any of the plaintiffs, or receive any letters from any of the plaintiffs, about any alleged conspiracy to exclude black promoters from the concert promotion business." (*Id.* ¶ 36 (citing Mickelson Decl. I, McCabe Decl. Ex. 4, ¶ 7, Granat Decl., in McCabe Decl. Ex. 5, ¶ 7).) Plaintiffs' Counter Jam 56.1 Statement in response dispute in part paragraphs 39 and 36 of Jam's 56.1 Statement. However, paragraphs 39 and 36 of Plaintiffs' Counter Jam 56.1 Statement are the same and are simply argumentative, stating, "Even though *Plaintiffs communicated with Jam only indirectly through CAA regarding this matter* [co-promotion of Toni Braxton], it is not conceivable, and for that reason a jury may well conclude, that Jam would not give up a piece of a concert for which the work was already done to a promoter with whom it had never co-promoted without being told the reason." (citing Rowe Jam Aff. II, Pls.' Counter Jam 56.1 Stmt. Ex. 8, ¶¶ 18-20; Light Dep., Pls.' Counter Jam 56.1 Stmt. Ex. 13, at 486-90, 493-98; Letter Agreement

from Mr. Light to Mr. Rowe and Mr. Boseman, dated Jan. 6, 1997, Pls.' Counter Jam 56.1 Stmt. Ex. 14 (emphasis added).)

Plaintiffs' response is deemed an admission (1) that Plaintiffs did not communicate with anyone at Jam regarding the Plaintiffs' claim of a conspiracy or about their alleged exclusion from the second Kenny G/Braxton concert in Chicago and (2) that Plaintiffs did not obtain evidence from which an inference can be drawn that Jam acted in a discriminatory manner. Review of the testimony cited by paragraphs 39 and 36 of Plaintiffs' Responses to Jam's 56.1 Statement does not support the conclusion that Jam knew, or was part of, any alleged conspiracy to exclude Plaintiffs from the concert promotion business.

First, the cited paragraphs of Mr. Rowe's affidavit, dated April 21, 2003, submitted in support of Plaintiffs' Counter Jam 56.1 Statement, do not show Jam was made aware of any claim of an alleged conspiracy between the booking agents and dominant white promoters to exclude black promoters from the concert promotion business.

Second, review of the cited testimony of Mr. Light of CAA similarly does not provide evidence that Jam was made aware of any claims of a conspiracy to discriminate against Plaintiffs.

Furthermore, Plaintiffs' claim, as made in their responses to paragraphs 39 and 36 Jam's 56.1 Statement, that Jam would not have agreed to allow Mr. Rowe and Mr. Boseman to be co-promoters without being aware that Plaintiffs were alleging a conspiracy to exclude them from concert promotion on the basis of race is sheer speculation, unsupported by Mr. Light's testimony or other evidence from which such an inference could be drawn. One could equally speculate that Mr. Light told Jam that Kenny G's manager insisted on co-promotion

with Plaintiffs because Ms. Braxton's music was directed to black audiences.[126] In view of the foregoing discussion, Jam's motion for summary judgment on each claim in the complaint is granted.

2. *Beaver Productions Inc.'s Motion for Summary Judgment*

The claims in the Amended Complaint that Beaver discriminated against Plaintiffs are based on three alleged overt acts by Beaver. First, Plaintiffs allege that Don Fox, president of Beaver, refused to allow any of the Plaintiffs to promote Toni Braxton in 1997 at the Lake Front Arena in New Orleans. (Am.Compl.¶ 87(f).) Second, Plaintiffs allege that in late summer 1997, Mr. Fox refused to allow Plaintiff Rowe to co-promote the 1997 Luther Vandross show. (*Id.* ¶ 87(h).) Third, Plaintiffs claim that Beaver interfered with Plaintiff Fred Jones's potential exclusive agreement to promote shows at the Mud Island Amphitheatre in Memphis and conspired with other Defendants to interfere with this contract. (*Id.* ¶ 87(k).) Plaintiffs also allege that Beaver has participated in a conspiracy to exclude black concert promoters from promoting white and top-drawing black artists and cite Beaver's alleged dominance in the greater New Orleans area, automatic receipt of contracts without bidding, and receipt of more favorable contract terms, such as deposit and method of payment requirements in Beaver's contracts, as evidence of this conspiracy. (Pls.' Revised Response in Opp'n to Beaver's Mot. for Summ. J., dated Mar. 12, 2003 ("Pls.' Resp. Beaver"), at 18-22.)

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[126] As alleged in paragraph 87(f) of the Amended Complaint, Kenny G is a white artist.

Plaintiffs have not presented any direct evidence to support any of these claims. Accordingly, the Court will examine the evidence presented by Plaintiffs to determine if they have provided evidence from which it may be inferred that Beaver has violated §§ 1981, 1985(3) and 1986.

(i) Toni Braxion Concert

The Amended Complaint alleges that in 1997, Mr. Fox "refused to allow any of the plaintiffs to promote Toni Braxton in his territory, the Lake Front Arena in New Orleans, telling Rob Light of CAA that he would not allow it." (Am.Compl.¶ 87(f); *see also* Rowe Beaver Decl., Pls.' Beaver Ex. 6, ¶ 19.) The general facts related to the Kenny G/ Braxton 1997 tour are reviewed in the Jam section. *Supra* pp. 73-76. In relation to Beaver specifically, Mr. Rowe did not approach Beaver or Mr. Fox with a request to co-promote, but had discussions with Rob Light, head of the music department at CAA, about co-promoting the Braxton performances. (Rowe Beaver Decl., Pls.' Beaver Ex. 6, ¶ 19; Pls.' Rev. Beaver 56.1 Stmt. ¶ 56.) When Mr. Rowe approached Mr. Light, Beaver had already contracted to promote the Kenny G/Toni Braxton concert in New Orleans.[127] (Rowe Beaver Decl. ¶ 19; Pls.' Rev. Beaver 56.1 Stmt ¶ 57.)[128]

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[127] The 1996 contracts for the Kenny G concerts between the concert promoters and Turner Management provided that Kenny G would provide the services of Toni Braxton and that she would receive 34% of the net revenues. (Light Decl. II, Ex. 6.) (The Court could not find Beaver's contract with Turner Management.) Ms. Braxton's manager testified that Ms. Braxton saved the expense of her agent (WMA) by allowing Kenny G, his manager and CAA to negotiate the concerts for her. (Phillips Dep., in Pls. CAA Dep. Tr., Vol. II, at 33-34.)

[128] Mr. Rowe's affidavit, dated April 21, 2003, also confirms that he learned about the lower guarantees on the 1997 Kenny G/Toni

According to Mr. Rowe, Rob Light told him that Don Fox of Beaver would not allow him to co-promote in New Orleans, but he could participate in the tour in other markets. (Rowe Beaver Decl., Pls.' Beaver Ex. 6, ¶¶ 20-21.) Plaintiffs provide no testimony from Mr. Light confirming that he did in fact have such a conversation with Mr. Fox. Accordingly, Mr. Rowe's statement about that conversation is hearsay and not admissible evidence. F.R. Civ. P. 56(b).

Mr. Fox has submitted a sworn declaration stating that he did not tell anyone, including Rob Light of CAA, that Beaver would not allow any of the Plaintiffs to co-promote Toni Braxton. (Fox Beaver Decl., Beaver Ex. 1, ¶ 19.) Rather, Mr. Fox states that "[p]romoting Toni Braxton was not a possibility with respect to this concert because Kenny G was the lead act, with Toni Braxton as the supporting act." (*Id.* ¶ 18.) "Beaver purchased the services of Kenny G as the lead act, and Kenny G selected Toni Braxton as the supporting act. Beaver had no control, authority or role in the selection of Toni Braxton as the supporting act for this concert, as supporting acts are selected by the artists themselves." (*Id.* ¶ 38.)

Even assuming Mr. Light's alleged statement to Mr. Rowe that Mr. Fox had refused to allow Mr. Rowe to co-promote Toni Braxton is not hearsay and could be admitted in evidence, Plaintiffs have not provided evidence showing that Beaver's alleged refusal to co-promote could form the basis of a prima facie case of discrimination under *McDonnell Douglas*. Even if Plaintiffs had requested to co-promote,[129] Plaintiffs have presented no

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Braxton tour after it "had been sold to the dominant white promoters." (Rowe Jam Aff. II, Pls.' Counter Jam 56.1 Stmt., ¶ 29; *but see supra* pp. 76-78.)

[129] Additionally, Plaintiffs have not submitted any evidence showing that they submitted a bid to co-promote this concert.

evidence showing that Beaver was seeking co-promoters or decided to use a white co-promoter instead of Mr. Rowe. Furthermore, Beaver had a legitimate business reason not to co-promote since it had already been awarded the concert and was under no obligation to relinquish to Mr. Rowe a share of any of the benefits of its contract with Kenny G. Beaver merely behaved in a competitive manner, acting in its own self-interest. Plaintiffs do not cite any evidence to demonstrate that Beaver's offered business reason was pretextual. *McDonnell Douglas*, 411 U.S. at 804.

(ii) Luther Vandross Concert

The Amended Complaint also alleges that Beaver denied Plaintiff Rowe a role as promoter of a 1997 concert by Luther Vandross in New Orleans, and further alleges that even after Mr. Rowe explained to Mr. Fox that he had previously promoted Luther Vandross, Mr. Fox did not allow him to co-promote a Luther Vandross show in New Orleans, Louisiana. (Am.Compl.¶ 87(h).) To provide evidentiary support for these claims, Mr. Rowe has submitted a declaration in Plaintiffs' Response to Beaver's Motion in support of this allegation (Rowe Beaver Decl., Pls.' Beaver Ex. 6, ¶¶ 22-25), in which Mr. Rowe's factual statements make clear that he never had any personal discussions with Mr. Fox or Beaver about the August 1997 Vandross concert.

Mr. Rowe states that he had promoted Luther Vandross in 1986, 1987 and 1988. (*Id.* ¶ 22.) Similar to the Toni Braxton incident, Mr. Rowe states that he found out about the 1997 Vandross concert in New Orleans after the concert date was already "sold to Beaver." (*Id.*) Mr. Rowe states that he contacted Dennis Arfa, Luther Van-

dross's booking agent at QBQ Entertainment,[130] who asked Mr. Rowe to choose which markets he wanted to be involved in. (*Id.* ¶23.) Mr. Rowe states he chose New Orleans and called Mr. Fox to discuss co-promoting the concert, but Mr. Fox did not return his call. (*Id.* ¶24.) According to Mr. Rowe, Mr. Arfa then informed him "that Don Fox had refused to agree to allow me or any other black promoter to co-promote Luther Vandross/Vanessa Williams with him." (*Id.* ¶25.)[131] Again, according to Mr. Rowe, Mr. Arfa did not require Mr. Fox to co-promote that concert, and Mr. Rowe was not involved. (*Id.*)

Mr. Fox corroborates that Beaver received a call from Mr. Rowe towards the end of July 1997. (Fox Beaver Decl., Beaver Ex. 1, ¶20; Fox Dep., Beaver Ex. 5, at 112.) Mr. Fox states that at that time, he "suspected that Mr. Rowe wanted to co-promote concerts involving Luther Vandross and Vanessa Williams," and he "elected not to return [the] phone call." (Fox Beaver Decl., Beaver Ex. 1, ¶¶21-22.) In his deposition testimony, Mr. Fox states that "the only reason [Mr. Rowe] called me was just to get in and be a partner on a show when the show was already confirmed." (Fox Dep., Beaver Ex. 5, at 107.) Mr. Fox further explains in his declaration that "[s]ince the concert had already been confirmed to Beaver, there was no economic reason for Beaver to co-promote the concert with any other promoter . . . . and for this reason, Beaver declined to co-promote the concert with Leonard Rowe." (Fox Decl., Beaver Ex. 1,

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130 QBQ is a former Booking Agency Defendant, against whom Plaintiffs have dismissed their claims.

131 Mr. Rowe's testimony about Mr. Arfa's statement is hearsay. Since Plaintiffs offer no testimony that Don Fox said he would not allow Mr. Rowe, or any other black promoter, to co-promote Vandross, Mr. Rowe's testimony must be disregarded.

¶23.) After his call to Mr. Fox, Mr. Rowe wrote a letter on BPA letterhead, dated July 24, 1997, to Mr. Arfa with copies to black leaders stating that Mr. Fox "exerts racist behavior toward black people and black promoters" and "declaring economic warfare on any and all of Beaver Promotions that embrace African-Americans Artists." (Beaver Ex. 3.) On July 25, 1997, Mr. Fox wrote a letter to Mr. Rowe denying racist behavior. (Beaver Ex. 4.)

While it appears that Beaver determined not to take actions that would inure to Mr. Rowe's benefit, there is no showing of a prima facie case of discrimination under *McDonnell Douglas*. As with the Kenny G/Braxton concert, Beaver already had obtained the Vandross contract,[132] and Plaintiffs provide no evidence that Beaver was seeking co-promoters or opted to co-promote with a white co-promoter instead of Mr. Rowe. Beaver had a legitimate business reason not to co-promote and was perfectly justified in choosing to not share the benefits of the Vandross concert with Mr. Rowe. Plaintiffs do not provide any evidence to demonstrate that Beaver's offered business reason was pretextual. *McDonnell Douglas*, 411 U .S. at 804. Accordingly, these facts do not show actions which give rise to an inference of racial discrimination in violation of § 1981.

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[132] Again, Plaintiffs fail to present evidence showing they submitted bids to promote or co-promote on the Luther Vandross concert. Although Plaintiffs assert that they did not submit bids because of the futility of this action, Plaintiffs have failed to present evidence supporting this theory.

(iii) Mud Island Amphitheater Exclusivity Agreement

(a) Amended Complaint Claim

Plaintiffs claim of discrimination in relation to the Mud Island Amphitheatre reads as follows:

> While still negotiating the terms of an exclusive agreement to promote shows in the venue Mud Island Amphitheatre in Memphis, Fred Jones and Summitt wrote to many of the booking agency defendants and others . . . . advising them of his expected role as concert promoter at the venue. Beaver Production's executive Barry Leff, however, then wrote to the Memphis Director of Parks Commission, urging the city not to enter into any agreement with Fred Jones and Summitt, and informing the city that Beaver would be opening an office in Memphis, where it had not previously done business, expressly at the request of the top talent agencies in the county. Fred Jones and Summitt lost the agreement to promote at Mud Island and all ensuing business. Beaver is now the predominant promoter in Memphis.

(Am.Compl.¶ 87(k).)

(b) Review of Facts

The chronology of the events is as follows and is undisputed, unless otherwise noted. In 1992, Mid-South Concerts, an alleged dominant promoter owned by a white promoter, Bob Kelley, and Summitt Management, owned by Plaintiff Jones, formed a partnership by the name of Island Events, which Mr. Kelley (a two-thirds owner) operated. (Jones Beaver Decl., Pls.' Beaver Ex. 1, ¶ 5; Aff. of Fred Jones, dated Apr. 24, 2003 ("Jones

CAA Aff."), Pls.' CAA Ex. 2, ¶¶ 20, 21, 59; Jones Dep., Pls.' Resp. WMA Ex. 49, at 50.)

In Memphis, the mayor serves as the sole contracting authority for the municipality. (Dep. of Willie W. Herenton, Mayor of Memphis, dated Oct. 15, 2001 ("Herenton Dep."), Beaver Ex. 9, at 13.) Mud Island itself is under the jurisdiction of the Memphis Park Commission, but any contract with respect to Mud Island has to be finalized and approved by the Mayor. (*Id.* at 27.) As a matter of procedure, a proposal normally would be first sent to the Park Commission, who then makes a recommendation to the Park Board regarding the proposal. (*Id.* at 38-39.) The Park Board then votes to either approve or reject the contract, and if approved, it goes to the mayor for final approval. (*Id.* at 39.)

In March 1993, Mayor Herenton, had approved a two-year exclusive promotion agreement at Mud Island between Island Events and the City of Memphis. (Jones Beaver Decl., Pls. Beaver Ex. 1, ¶¶ 5-6.) When the agreement expired in 1995, it was renegotiated and again approved by the Mayor to last through 1997. (*Id.* ¶ 8.)

In early 1998, Island Events negotiated the draft of an exclusive contract, which was approved by the staff of the Park Commission. (*Id.* ¶ 9). On March 4, 1998, Bob Fouche, acting manager at Mud Island, sent a draft of the agreement to the Park Commission Board for its review. (*Id.* ¶ 10.) On March 27, however, Bob Kelley committed suicide. (*Id.* ¶ 11.) As a result, a new agreement was drafted in which Summitt was to have an exclusive promotion agreement at Mud Island for two years, with a potential third year contingent on Summitt's performance. (*Id.* ¶ 12.)

Mr. Jones testified that on April 17, 1998, he told the Mayor that the Park Board had approved his exclusive agreement for Mud Island. (Jones Dep., Beaver Ex. 8, at

363.) At that point, according to Mr. Jones, the Mayor said that he was fine with the contract going along as planned. (*Id.* at 363-65.) In Mayor Herenton's deposition, the Mayor agreed that he and Jones "did have some discussion about this," but did not acknowledge the time or the content of his statement. (Herenton Dep., Pls.' Beaver Ex. 2, at 36.) Three days later, on April 20, 1998, the Board of the Memphis Park Commission approved the agreement with Summitt. (Jones Beaver Decl., Pls.' Beaver Ex. 1, ¶ 14.)

On April 20 and 21, 1998, Mr. Jones faxed two letters to various booking agents, including agents employed by the Booking Agency Defendants, other than Renaissance. (*Id.* ¶¶ 15-16.)[133] The letters were identical and stated, in part, that "[a]s of today, my company Summitt Management Corporation, will exclusively book the [Mud Island] amphitheater. We have a multi-year agreement with the city of Memphis into the next millennium." (Pls.' Beaver Ex. 1B ("Jones letter").) These letters were not sent to any concert promoters. (Jones Beaver Decl., Pls.' Beaver Ex. 1, ¶ 18.) When Mr. Jones faxed his letters, the Mayor had not yet officially approved the agreement, as required by the Memphis Charter.

On April 20, 1998, Barry Leff, vice-president of Beaver, sent a letter to Wayne Boyer, Director of the Memphis Park Commission. (Pls .' Beaver Ex. 1C ("Leff letter") at 1.) His letter is included here in full because the Plaintiff Jones considers it so central to his arguments.

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[133] Copies of the letter indicate that copies were sent to CAA and WMA but not to Renaissance. (Pls.' Beaver Ex. 1A, 1B (documents P00719, P007196, P007197, POO7201, POO720, P007194, and P007195).) Copies were also sent to the media. (*Id.* (document P00720).)

I understand today you are considering an exclusive agreement on the future of Mud Island this summer. I want to inform you that because of the unfortunate circumstances with Mid-South Concerts, my company has been asked by the top talent agencies in the country to establish an office in Memphis and begin immediately booking all venues in the area. We produce about 200 shows across North America every year, and because of our relationship with Bob Kelly [sic] we have always stayed out of your market.

As of this past Friday, we have hired Susan Green, former V.P. of Mid-South Concerts. We are in the process of opening an office in Memphis and plan to hire additional staff members. We have already begun to actively pursue shows in the market and are very much looking forward to doing shows in your facility.

If however, an exclusive agreement is entered into with any other party, it will cause us to take our shows to other facilities in the market. I want to make it clear that we understand your concern for getting shows into Mud Island this summer, and we *can* and *will* help you do that. I would like to suggest because of the timing of all the events that have surrounded the 1998 season, that you keep your facility open to all promoters this summer. This will allow you to judge the true intent of all outside promoters.

Beaver Productions is very excited about our future in Memphis. Please keep your doors open and allow us to show you what a great business relationship we can have together.

(*Id.* (emphasis in original).)

Mr. Jones received a letter, dated April 22, 1998, from John Malmo, chairman of the Board of the Memphis Park Commission. (Jones Beaver Decl., Pls.' Beaver Ex. 1, ¶ 19.) In this letter, Mr. Malmo wrote:

> Mayor Herenton told me yesterday that he believes it is unwise for the Memphis Park Commission Board to sign an exclusive contract for booking the Mud Island amphitheater for the 1998 season. Further, that he believes it unwise for the Board to sign a multi-year agreement of any kind with any firm for such bookings.
>
> He has asked that we invite a variety of promoters to book events in the amphitheater this season to sample the opportunities that may be available to us that would not be under an exclusive agreement with any one firm.
>
> The Mayor has assured me that he will not sign an exclusive and/or multi-year contract for 1998 under any circumstances. . . .

(Pls.' Beaver Ex. 1D ("Malmo letter"), at 1.)

On April 23, the Mayor issued a press release stating in its entirety:

> Fred Jones is a competent and well-respected promoter. However, at this time I support an open contract regarding the use of the Mud Island Amphitheater. I encourage Fred Jones and other promoters to bring numerous entertainment acts to Memphis. A myriad of musical acts would best serve the citizens of Memphis and generate a greater return of investment to the Memphis Park Commission.

(Pls.' Beaver Ex. 1E at 1.)

Thereafter, Beaver promoted fourteen concerts at Mud Island. (Fox Beaver Decl., Beaver Ex. 1, ¶¶ 34-35.) Summitt did not promote any. (Jones Beaver Decl., Pls.' Beaver Ex. 1, ¶ 22.) Mr. Jones testified that Summitt did not make any effort to promote at Mud Island for the rest of the season, nor from 1999 to 2001. (Jones Dep., Beaver Ex. 8, at 366-67.) Mr. Jones maintains that without the revenue from parking, food, and souvenir concessions, which were part of the exclusive agreement, it was not economically feasible for him to promote concerts on a non-exclusive basis. (Jones Beaver Decl., Pls.' Beaver Ex. 1, ¶ 22.)

(c) Plaintiffs Have Presented No Evidence in Support of Their Claims Under §§ 1981 and 1985(3) Against Beaver in Relation to Mud Island

The undisputed evidence is that Mayor Herenton, the black Mayor of Memphis, was not aware of the Leff letter to Wayne Boyer, Director of the Memphis Park Commission, at the time he decided not to approve an exclusive agreement for Mud Island with Summitt. (Herenton Dep., Beaver Ex. 9, at 40 (stating that he was seeing the Leff letter for the first time in that deposition).) The Mayor had no recollection of any communications with Mr. Boyer or Mr. Malmo regarding Beaver (Herenton Dep., Pls.' Beaver Ex. 2, at 76), and testified that he did not hear about Beaver's interest in promoting in Memphis until after he decided not to approve the exclusive agreement with Summitt (*id.* at 77-78). Mayor Herenton also testified that the Leff letter had nothing to do with his decision (Herenton Dep., Beaver Ex. 9, at 46), but rather that he "thought it was in the best interest of the City of Memphis and that facility that we open up participation to a variety of promoters" (*id.* at 47).

The Plaintiffs offer no testimony by Mr. Malmo, Mr. Boyer, or anyone else showing that the Mayor was aware of the Leff Letter or casting any doubt about or contradicting Mayor Herenton's testimony. Accordingly, the uncontradicted evidence is that Mr. Jones was denied the exclusive contract at Mud Island based only on the independent decision of the Mayor and that the Leff letter had no effect on that decision, either directly or indirectly. Thus, the Plaintiffs have not shown that Beaver's actions involving Mud Island injured Mr. Jones or any of the Plaintiffs or interfered with a potential contractual relationship in violation of 42 U.S.C. § 1981. *See Murray,* 844 F.2d at 995.

Furthermore, Plaintiffs offer no evidence from which it can be inferred that any action by Beaver was motivated by Mr. Jones's race. Mr. Fox, owner of Beaver, testified that he had never heard of Fred Jones before learning of the proposed exclusive agreement, did not know Mr. Jones was Mr. Kelley's partner in promoting concerts at Mud Island (Fox Dep., Pls.' Beaver Ex. 5, at 39), and did not know Mr. Jones was an African American (*id.* at 38). Mr. Leff did know of a promoter in Memphis named Fred Jones but had never met him and could not recall if he knew Mr. Jones was black. (Leff Dep., Pls.' Beaver Ex. 4, at 33.) Mr. Jones did not offer contradictory testimony. Furthermore, by April 17, 1998, Beaver had decided to open an office in Memphis with Susan Green, former vice president of Mid-South Concerts. (*Id.* at 50-52; *see also* Pls.' Hrg. Ex. 26 (Letter from Shelly Schultz of WMA to Susan Green and copied to Don Fox, dated Apr. 17, 1998 (discussing cancelling the James Taylor concert at the Mud Island Amphitheatre and rescheduling with "Don Fox in conjunction with you and your new organization" for a concert at Mid-

South Coliseum).)[134] Having made the decision to open an office in Memphis, it was in Beaver's economic interest not to have Mud Island subject to an exclusive contract.[135] (Leff Dep., Pls.' Beaver Ex. 4, at 10-12.)

Plaintiffs cite the statement in the Leff letter that "my company has been asked by the top talent agencies in the country to establish an office in Memphis" as evidence that "the Defendant agencies . . . . conspired with the dominant white promoter Defendants, including Beaver, to prevent all black promoters, including the Plaintiffs, from promoting white and superstar black acts." (Pls.' Resp. Beaver 56.1 Stmt. ¶ 15.)

Although the Leff letter does state that Beaver had been asked by the top booking agencies in the country to establish an office in Memphis and to begin immediately booking all venues in that area,[136] Plaintiffs provide no evidence from which one could infer that this decision to open an office in Memphis was racially motivated or in furtherance of a conspiracy to discriminate. Whether Beaver had remained out of the Memphis market because of Mid-South's exclusivity contracts at Mid-

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134 This letter from Mr. Schultz to Ms. Green is also dated three days prior to: (1) Mr. Jones's press release about his Mud Island exclusive to booking agencies and the media; (2) Mr. Leff's letter to Mr. Boyer, urging the Memphis Board not to grant an exclusive contract at Mud Island; and (3) the Board of the Memphis Park Commission's approval of the Summitt agreement.

135 The Leff letter of April 20, 1998, also mentions Beaver's hiring of Susan Green the previous Friday, which was April 17, 1998.

136 Mr. Leff testified he wrote Mr. Boyer without prompting by anyone (Leff Dep., Pls.' Beaver Ex. 4, at 12-13) and that his statement about the top talent agencies requesting Beaver to open a Memphis office was misworded (*id.* at 20). He testified he wrote this at an emotional time, after Bob Kelley's suicide, and he should have written "many people." (*Id.* at 20-22.)

South Coliseum and Mud Island, or because of Mr. Kelley's reputation with artists, artists' managers and booking agencies and his greater familiarity with the Memphis market is beside the point. Beaver's actions were taken after the death of a concert promoter, whom Plaintiffs assert was the dominant promoter in Memphis, and Beaver moved into a newly created vacuum with one of Mr. Kelley's top employees. While these actions could be consistent with a racially motivated conspiracy to interfere with a contractual relationship, Beaver's hiring of one of Mr. Kelley's top employees to open a Memphis office was obviously in Beaver's economic interests. Beaver points out that Mr. Leff urged fewer restrictions on trade, not less, in furtherance of their economic interests. (Hrg. Tr. 10/17/03 at 83.) Accordingly, Plaintiffs have presented no evidence giving rise to an inference of racial motivation to sustain their claims under 42 U.S.C. §§ 1981 or 1985(3).

(iv) Other §§ 1985(3) and 1986 Claims Against Beaver

Plaintiffs have offered no direct evidence of a conspiracy, such as when the conspiracy started, how Beaver joined the conspiracy and how Beaver was aware of the conspiracy's objectives,[137] to support their conclusory

[137] Plaintiffs again cite the article "Black Promoters Say They're Excluded From Top R & B Gigs" from the June 21, 1997 issue of Billboard Magazine (Pls.' Beaver Ex. 6K) as evidence to show that Beaver was aware of discrimination against black promoters. (Pls.' Resp. Beaver 56.1 Stmt. ¶ 19) As with this claim against Jam, discussed *supra* p. 87, this article provides no basis for an inference of Beaver's knowledge of a conspiracy to exclude black promoters. As in the Jam section, even if the article provided notice of a conspiracy in violation of § 1985, the evidence presented does not show that Beaver had any knowledge of that white promoters were members of a conspiracy to discriminate against black promoters. Thus, this claim

allegation that Beaver participated in a conspiracy to exclude black concert promoters from promoting concerts for white and/or top-drawing black artists in violation of § 1985(3) and § 1986.

Beaver states that it "has not attempted to prevent any of the plaintiffs, or any black promoter, from submitting a bid to promote or co-promote any concert."[138] (Beaver 56.1 Stmt. ¶ 18 (citing Fox Decl.).) Beaver also asserts it has "not participated in any conspiracy, combination or agreement to exclude black promoters from promoting any concerts." (*Id.* ¶ 19 (citing Fox. Decl.).) Plaintiffs counter, as with Jam, by claiming that "the facts when taken as a whole demonstrate that Beaver in fact prevented the Plaintiffs and other black promoters from submitting a bid to promote or co-promote concerts" (Pls.' Resp. Beaver 56.1 Stmt. ¶ 18) and that "[t]he facts when taken as a whole prove that Beaver has participated in a conspiracy combination or agreement to exclude black promoters from promoting concerts of white and superstar black acts" (*id.* ¶ 19). Plaintiffs

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must fail. *See Buck*, 536 F.2d at 524 (holding that defendants' knowledge of allegedly discriminatory acts is a prerequisite to suit under § 1986).

[138] Although Plaintiffs assert that "Fox has never involved any black promoter as a co-promoter when a white artist was the featured act," (Pls.' Resp. Beaver Mem. at 11), Fox has co-promoted black artists with Al Haymon, an African-American promoter, and has co-promoted Kenny G, a white artist, with Larry Bailey, also African-American, in nineteen separate concerts (Fox Beaver Decl., Beaver Ex. 1, ¶¶ 14-15; Beaver 56.1 Stmt. ¶ 11). Plaintiffs claim that the only reason Larry Bailey was involved in co-promoting Kenny G with Beaver was Mr. Bailey's long standing friendship with Kenny G and base this claim on paragraph 29 of Mr. Rowe's declaration. (Pls.' Resp, Beaver 56.1 Stmt. ¶ 11 (citing Rowe Beaver Decl., Pls.' Beaver Ex. 6, ¶ 29.) Mr. Rowe provides no evidentiary basis for this conclusion, which is beyond the scope of his personal knowledge and therefore inadmissible.

claim that Beaver's participation in the conspiracy is proven by Beaver's alleged territorial dominance, the alleged lack of competition in the industry, and the alleged automatic awarding of contracts to Beaver.[139] (*Id.*) However, the only evidence cited to support these allegations in Plaintiffs' Response to Beaver's 56.1 Statement is Mr. Rowe's declaration, dated February 27, 2003, which does not contain statements supporting these claims shown to be based on personal knowledge. As stated previously, Plaintiffs have submitted no evidence demonstrating that Mr. Rowe is qualified to give expert testimony on the concert promotion industry and when he speaks on matters beyond his personal knowledge, these statements are inadmissible under the Federal Rules of Evidence. *See* Fed.R.Evid. 602. Thus, Plaintiffs have submitted no evidence to support these conclusory allegations.[140]

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[139] Plaintiffs allege that Beaver has not produced any bids, citing paragraph 26 of Rowe's declaration. (Pls.' Resp. Beaver Mem. at 19.) In his affidavit, dated March 13, 2003, Steven Mark Grishman, the Chief Financial Officer for Beaver, stated that "[e]very individual concert file in the possession of Beaver Productions, Inc., *without exception*, contains a bid sheet." (Grishman Aff., attached as Ex. 1 to Beaver Reply Mem., ¶6 (emphasis in original).) Mr. Grishman also stated that he "personally reviewed . . . . [the] documents that were produced to the plaintiffs, and contained therein were ninety-seven (97) separate and distinct bid sheets, for different shows" and then listed the specific numbers of these sheets. (*Id.* ¶8.) Beaver presented these bid sheets at the hearing. (Court Ex. A.)

[140] In Plaintiffs' Memorandum, they support these allegations by citing to paragraphs 3 and 5 of Mr. R. Johnson's affidavit and the Pollstar data. (Pls.' Resp. Beaver Mem. at 20-21.) As stated *supra* p. 32 in the antitrust and Jam section, this information does not support Plaintiffs' claim that Beaver, or any Promoter Defendant, has territorial dominance. Nor does it support the existence of a conspiracy among defendants to exclude black promoters.

(*footnote continued*)

As for Plaintiffs' claim that Beaver receives favorable contract terms, which are unavailable to black promot-

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Plaintiffs also misleadingly cite testimony by Brad Wavra, vice president of Clear Channel Touring's music division, stating that "there is a predominant promoter in *every* market, one that does the majority of dates" (citing Dep. of Brad Wavra, dated Feb. 28, 2002 ("Wavra Dep."), attached as Ex. 11 in Pls.' Beaver Exs., at 56, 84) and that ' "primarily concert promoters were regionally oriented, and . . . . their primary interest was just playing specific acts in their regions, and that seemed to be how the business was primarily structured' " [quoting *id.* at 56]. (Pls. Resp. Beaver Mem. at 21 (emphasis added).) However, Mr. Wavra testified that there is a "predominant promoter in *many* markets" and that that this came about based on performance and how a promoter built relationships, not a conspiracy to exclude black promoters. (Wavra Dep., Pls.' Beaver Ex. 11, at 84.) Mr. Wavra also does not list Jam or Beaver as a predominant promoter in his testimony. (*Id.* at 56.)

Plaintiffs cite other testimony by Brad Wavra as support for the alleged conspiracy, specifically that there is a "concert promoting fraternity," which included Mr. Fox, and that Mr. Wavra did not *initially* include any black promoters as members of the fraternity. (Pls.' Resp. Beaver Mem. at 23 (citing Wavra Dep., Pls.' Beaver Ex. 11, at 39-40.) Mr. Wavra, however, testified that he was using the term fraternity "loosely," that if a person was "in the music business then they would be part of that fraternity" and that the fraternity included black promoter Al Haymon. (Wavra Dep., in Joint Reply Appendix Filed in Further Supp. of Booking Agency Defs.' Mot. for Summ. J., undated (received May 29, 2003) ("J. Reply A."), at 42-43.)

Plaintiffs also cite the testimony of Mr. Alex Cooley as support for the alleged conspiracy, specifically that "(a) there is a 'good ole boy network . . . . and yes, racism very well in some cases could raise its head in there,' (b) he knows of no black promoters who are a part of the good ole boy network, and (c) racism plays a part in the concert promotion industry today with regard to black promoters not promoting white acts." (Pls. Resp. Beaver Mem. at 23 (quoting and citing Dep. of Alex Cooley, dated Mar. 20, 2003 ("Cooley Dep."), attached as Ex. 12 to Pls.' Beaver Exs., at 96-97, 105.) Mr. Cooley, however, also testified that racism was not "an overriding pervasive major thing in the industry" (Cooley Dep., in J. Reply A., at 96), that "the business has changed so drastically that [race] is not much of a factor" (*id.* at 98), that the "good ole boy network" was

ers, (Pls.' Resp. Beaver 56.1 Stmt. ¶¶ 7- 9),[141] as in discussed in the Jam section, *see supra* pp. 83-86, the evidence shows that these are negotiated terms, which are approved by artists and their managers and do not raise an inference of discrimination based on race. Plaintiffs offer as exhibits a multitude of copies, many of which are duplicates, of contracts between the artists and Beaver. (Pls.' Resp. Beaver Mem. Ex. 6E, 6F.) Plaintiffs do not show that they bid on any of the concerts to which the exhibit contracts pertain; thus, the Promoter Defendants' negotiation of these contracts are not evidence of disparate treatment with respect to any specific contract that Plaintiffs sought. Furthermore, the contracts' disparate terms would affect other white promoters just as much as the Plaintiffs. Accordingly, no inference of discrimination based on race can be made.

In the Plaintiffs' Response to Beaver's Memorandum, Plaintiffs cite Mr. Rowe's review of "thousands of 'confidential' contracts between the other former and current promoter Defendants" (Rowe Beaver Decl., Pls.' Beaver Ex. 6, ¶ 14; *see also* Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶ 19) to assert that Beaver was almost always only required to pay a 10% deposit or no deposit at all. (Pls.' Resp. Beaver Mem. at 9.) Based on his review, Mr. Rowe asserts that he has "personal know-

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"not a conspiracy kind of a thing" (*id.* at 101), and that the "good ole boy network" consists of "friendships and business working relationships" (*id.* at 104).

[141] For example, a contract (without a signature line for Beaver) on a WMA form for the artist Protein to perform as a special guest at Howlin' Wolf in New Orleans on April 15, 1997, for $100 flat guarantee with no deposit (Pls.' Beaver Ex. 6A) and a 1999 contract (with Beaver) with Celine Dion on a CAA form with a deposit of 10% of artists' guarantee and a 92.5% artist split of gross receipts after deduction of expenses. (Pls.' Beaver Ex. 6B (document BEA 006410).)

ledge of two different deposit standards, one for white promoters and one for black promoters" and that "[e]ach was well known to Beaver and the agency Defendants who conspired to exclude black promoters from the competition by making the price to promote an act too steep." (Rowe Beaver Decl., Pls.' Beaver Ex. 6, ¶ 14; *see also* Rowe Jam Aff. I, Pls.' Rev. Jam Mem. Ex. 1, ¶ 19.) Plaintiffs have not shown that Mr. Rowe is qualified an expert witness, and no expert report stating that these contracts are a representative sample or supporting Mr. Rowe's conclusions has been submitted on this motion. (*See also* Jaynes Dep., in J. Reply A., at 288; *see also Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, No. 98-8272, 2003 WL 22124991, (S.D.N.Y. Sept. 15, 2003.)

Nonetheless, in a large number of those contracts, Beaver was required to pay no deposit or a 10% deposit. In others, Beaver was required to pay the 50% guarantee deposit. Thus, the Plaintiffs' selection of contracts shows that the lower deposit is not uniformly *offered* to Beaver. In some contracts Beaver evidently was able to negotiate a lesser deposit or other more favorable terms (such as payment by a company check rather than a certified check). Since the standard terms are often crossed out and initialed, the Court's review of the contracts in question show that the Booking Agency Defendants generally used a form of contract which asked concert promoters to pay a deposit of 50% of the artist's guarantee, but that the Beaver and other concert promoters would negotiate the deposit down to a lesser amount.[142] (*See*

[142] Since the contracts generally reflect that the booking agency did not offer better terms to the concert promoter the changes in contract terms strongly reflect negotiation by the promoters as claimed by Jam in the hearing. (Hrg. Tr. 10/20/03 at 207-11.) The successful concert promoters often end up with better terms than are offered by

Mickelson Decl. II, Roberts Decl. Ex. 1, ¶¶ 5-17 (describing the process for negotiating a contract between Jam, the booking agencies and the artists and stating that Jam's proposed changes to a draft contract are accompanied by a box stating "initial here" to indicate where changes are located); *see also* Dep. of Bill Washington, dated July 11, 2002 ("Washington Dep."), in J.A., Vol. VI, at 192 (a black promoter explaining that he has been able to negotiate lower deposit terms based on a prior relationship with the artist or the artist's manager); L. Bailey Dep., in J.A., Vol. IV, at 69-71 (a black promoter who has a personal relationship with Kenny G, explaining that he also had been able to receive a lower deposit requirement in contracts with Kenny G).)

Plaintiffs have presented no expert evidence or other evidence to negate the conclusion that there are good business reasons for the different terms negotiated in the contracts of the Promoter Defendants with the artist. Mr. Rowe's review of documents cannot create an inference of "two different deposit standards" used by the Booking Agency Defendants, particularly when review of the selected contracts presented to the Court shows that the different standard claimed is generally not offered to the Promoter Defendants and often is not negotiated to a lower standard by the Promoter Defendants.

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the Booking Agency Defendants. The only inference to be drawn is that due to their standing in the market or relationship with a desirable concert venues or relationship with the artists they can negotiate better contract terms. Indeed, a concert promoter who owns a desirable venue (Nederlander Theaters) may refuse to pay deposits. (*See* Fax from Nancy Vance of WMA to Billie Bullock, dated June 28, 1995 (stating "Nederlander does not pay deposits (never has, never will)"), Pls.' Hrg. Ex. 15.)

D. *Claims Against the Booking Agency Defendants*

1. *William Morris Agency, Inc.'s Motion for Summary Judgment*

Plaintiffs allege specific acts of discrimination and participation in a conspiracy to discriminate by WMA in the Amended Complaint and in their Response in Opposition to WMA's Motion for Summary Judgment. First, Plaintiffs allege that WMA and other Defendants excluded them from promoting Toni Braxton in connection with the 1997 Kenny G/Braxton tour. (Am. Compl. ¶87(f).) Second, Plaintiffs allege that WMA and other Defendants excluded them from promoting concert dates in 1998 and 1999 for Maxwell. (*Id.* ¶87(d).) Third, Plaintiffs allege that WMA excluded Plaintiff Boseman from promoting a concert by Erykah Badu in 1997 and excluded Plaintiffs generally from promoting Ms. Badu's concerts in 1998 in favor of the concert Promoter Defendants. (*Id.* ¶87(c).) Fourth, Plaintiffs claim that in the late 1980s and the 1990s, WMA allegedly "excluded plaintiffs from promoting shows given by [its] black artists the Temptations, Barry White, Earth Wind & Fire, War and Lauren [sic] Hill." (*Id.* ¶87(e).) Additionally, in their Response in Opposition to WMA's Motion for Summary Judgment, Plaintiffs further elaborate on their allegation of discrimination in relation to Lauryn Hill concert promotion and also allege that WMA prevented Plaintiff Jones from securing an exclusive at Mud Island and from promoting James Taylor at Mud Island. (Pls.' Resp. in Opp'n to WMA's Mot. for Summ. J., dated Apr. 24, 2003 ("Pls.' Resp. WMA"), at 19-21, 23-24.) Plain-

tiffs also allege various general claims of discrimination against WMA.[143] (*Id.* at 5-17.)

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[143] In Plaintiffs' Opposition to the Booking Agency Defendants' Motions for Summary Judgment, Plaintiffs cite to Exhibit 31 as evidence of WMA's and CAA's "unvarnished racial animus." (Pls.' Joint Mem. at 15.) Exhibit 31 is an unidentified and unauthenticated document, not produced by Plaintiffs in discovery, which Plaintiffs reference in support of the allegation in their opposition brief that "the racial epithet 'nigger' was used 349 times in e-mails of employees of CAA and WMA." (*Id.*; Declaration of Beverly R. Frank, Esq. in Support of Booking Agency Defendants' Motions for Summary Judgment, dated May 23, 2003 ("Frank Decl."), ¶¶ 3-4.) Despite repeated requests by CAA and WMA, Plaintiffs' new counsel refused to provide the Defendants with any foundational information regarding Exhibit 31 or to produce a hard copy of the underlying e-mails referenced in Exhibit 31.

In the first half of 2001, Plaintiffs' former counsel had sought production of Defendants' e-mails, including e-mail data stored on thousands of CAA and WMA back up tapes and computer hard drives. Magistrate Judge Francis granted the request by order dated January 16, 2002 (the "Order"), but required Plaintiffs' former counsel, among other things, to: (1) notify Defendants' counsel of the search procedure to be used by Plaintiffs in identifying responsive e-mails, including specific word searches; (2) identify any e-mails they considered "material" to this litigation; and (3) produce them to Defendants in "hard copy with Bates Stamp." *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421, 433 (S.D.N.Y.2002). Until the materiality of the e-mails had been agreed upon by counsel, this discovery was to be for attorney eyes only. *Id.* Plaintiffs' counsel, thereafter, notified Defendants that only the e-mails of certain named employees of the Defendant agencies would be searched. Defendants complained that Exhibit 31 demonstrates that the Plaintiffs thereafter conducted searches of mailbox users who were not among those agreed upon employees, and that Plaintiffs' counsel have not produced the hard copies of actual e-mails identified in Exhibit 31 as required by the Order. Plaintiffs' new counsel, thereafter, agreed that the number of uses of "nigger" referred to in their brief should have been 76 times, not 349 times, but due to Plaintiffs' failure to comply with Judge Francis's Order, Defendants have been unable to determine whether the racial epithet was used by an employee or by a correspondent to the

(i) Plaintiffs' Claims of Exclusion from Promoting Toni Braxton on the 1997 Kenny G/Toni Braxton Tour

With respect to the 1997 Kenny G/Braxton tour,[144] Plaintiffs have not provided any evidence to establish a prima facie case of racial discrimination by WMA under § 1981. Nor have Plaintiffs provided evidence which raises an inference that WMA conspired with other Defendants to exclude Plaintiffs. Plaintiffs have not offered any evidence that Mr. Rowe, Mr. Boseman, or any other Plaintiff had contact with any WMA agent regarding the Kenny G/Braxton tour. (Rowe Dep., in J.A., Vol. VI, at 1230 (stating that he had no contact with WMA "because CAA was the sole lead agency for the tour"); Boseman Dep., in J.A., Vol. III, at 815, 916, 945, 961-62, 1331, 1347 (discussing his conversations with CAA concerning Ms. Braxton, but never mentioning WMA).) Nor did Mr. King have any contact with any WMA agents regarding the Kenny G/Braxton tour. (King Dep., in J.A., Vol. V, at 1120.) Plaintiff Jones makes no assertion of discrimination in regards to the Kenny G/Braxton Tour.

Moreover, the evidence does not show that WMA had any involvement in choosing the lead promoters for concerts on the 1997 Kenny G/Braxton tour, which is the

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employee or was contained in song lyrics, scripts, screen plays or spam. (Frank Decl. ¶¶ 32-33.)

In view of Plaintiffs' new counsel's breaches of Magistrate Judge Francis's Order, and Plaintiffs' failure to present any evidence or argument to show that the e-mails constituted utterances by employees of Defendants whose actions were material to the issues in this case, the Court is disregarding Exhibit 31 in its entirety as irrelevant material.

[144] The facts related to the 1997 Kenny G/Braxton tour are reviewed *supra* pp. 73-76.

subject of Plaintiffs' Amended Complaint. As Brandon Phillips, Ms. Braxton's manager, testified:

> Well, basically, we didn't want to pay William Morris Agency a commission since she'd just gone there, and they really had nothing to do with this tour. We didn't need two agencies booking the tour.
>
> So we accepted CAA as the tour agent, but only Kenny G paid them a commission. Toni was able to avoid paying an agent's commission on her part of the tour. . . .
>
> And, structurally, it just meant that Mike Peranian [sic] and CAA went out there and either solicited or received the offers for the tour, for the Kenny G/Toni Braxton tour.

(Phillips Dep., in J.A., Vol. V, at 33-34; *see also* Light Decl. I, Ex. 6 (showing two Kenny G contracts, dated November 7 and 21, 1996, on CAA forms between Turner Management, Kenny G's manager, and promoters requiring Turner Management to produce artist Braxton and splitting artists' net revenues between Braxton and Kenny G 34%/51%); Armand Decl., attached to Light Decl. II, Ex. A (showing additional Kenny G contracts, dated in November 1996, December 1996 and January 1997, with similar terms to the above contracts).)

Therefore, Plaintiffs have documented no evidentiary basis from which to infer any acts of racial discrimination by WMA in connection with the 1997 Kenny G/Braxton tour.[145]

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[145] In their Response in Opposition, Plaintiffs attempt to inculpate WMA in the Plaintiffs' complaint about Kenny G/Braxton tour pointing out that WMA issued contracts for Ms. Braxton's performances to a former concert Promoter Defendant. (Pls.' Resp. WMA Mem. at 21 n. 45 (citing Pls.' WMA Ex. 43, a fax from Nick Caris of WMA to Rich Engler of Dicesare-Engler Productions, dated Jan. 17,

(ii) Plaintiffs' Claims Regarding the 1998 and 1999 Maxwell Tours

With respect to Plaintiffs' claim that WMA excluded and conspired to exclude Plaintiffs from promoting concert dates for Maxwell in 1998 and in 1999, the evidence shows that, in or about July 1998, Mr. Rowe called Jeff Frasco, WMA's agent assigned to black artist Maxwell, learned that Maxwell was going on tour, and was promised black promoter involvement in the tour. (Aff. of Leonard Rowe, dated Apr. 21, 2003, ("Rowe WMA

1997 (requesting the forwarding of a signed contract).) This fax was sent after Mr. Rowe and Mr. Boseman reached their agreement with Mr. Light for co-promotion of Ms. Braxton on January 6, 1997. (*See* Letter from Mr. Light to Mr. Rowe and Mr. Boseman, dated Jan. 6, 1997, attached as Ex. 14 to Pls.' Counter Jam 56.1 Stmt.) Plaintiffs also cite Exhibits 44 to 48, containing contracts on WMA forms with Ms. Braxton as a party, to demonstrate that WMA required only 10% or no deposit from dominant promoters whom it awarded "the Braxton concerts" or required a 50% deposit only a few days before her scheduled performance. (Pls.' Resp. WMA Mem. at 21 n. 46.) Review of these contracts shows that they are not the subject of Plaintiffs' complaint, which involved the original awarding of contracts to promote concerts on the 1997 Kenny G/Braxton tour by CAA's Mike Piranian in the fall of 1996. These contracts on WMA forms appear to provide remuneration for Ms. Braxton and assure her performance, but do not add terms to the original contract between Kenny G's manager and the promoter. (*See* Armand Decl., attached to Light Decl. II, Ex. A (contract on CAA form between Contemporary Productions and Turner Management, dated Nov. 12, 1996, for a concert at Kiel Auditorium in St. Louis on Jan. 16, 1997) and Pls.' Resp. WMA Ex. 47 (contract on WMA form between Contemporary Productions and Madam Ashley, Inc., Ms. Braxton's manager, dated Dec. 16, 1996 for this same concert).) Contemporary Productions' WMA contract form merely secures Ms. Braxton's services for the same concert on the terms required under Contemporary Productions contract with Turner Management. The evidence provided does not show WMA had any involvement in the scheduling or choosing of lead promoters for concerts on the Kenny G/Braxton tour.

Aff."), attached as Ex. 1 in Pls.' Resp. WMA Exs., ¶21.) Mr. Rowe then sent a letter, dated July 20, 1998, to Mr. Frasco (Pls.' Resp. WMA Ex. 18), but received no response. Exhibit 18, a letter on Rowe Entertainment letterhead, lists seven cities and states it is making a "firm offer" for:

Minneapolis, MN	$ 60,000.00/Per show
Chicago, IL	$100,000.00/Per show
Detroit, MI	$100,000.00/Per show
Washington, DC	$ 60,000.00/Per show
New York, NY	$125,000.00/Per show
Atlanta, GA	$100,000.00/Per show
Los Angeles, CA	$125,000.00/Per show

(*Id.*)[146]

Plaintiffs' Exhibit 19, a WMA draft tour schedule for Maxwell, shows that by August 5, 1998, WMA had also received firm guarantees for venues in five cities at an equal or higher price to those offered by Mr. Rowe, and shows the venue with seating capacity from a number of the Promoter Defendants with the name "Magic" or "Mag" scripted in for three of these cities.[147] (*Id.*)

On August 24, 1998, Mr. Rowe, as Executive President of the BPA, wrote to Magic Johnson and congratulated him on being assigned exclusive rights to promote the upcoming Maxwell tour and offered Mr. Johnson

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[146] Exhibit 18 lists no venues, dates, artist's split or other key terms for a specific concert that would allow an artist or an artist's manager to compare this offer to other promoters' offers for specific concerts. This letter, however, will be considered an offer for part of the national tour for the purposes of this opinion, as is admitted by WMA. (*See* Mem. of Law in Supp. of WMA's Mot. for Summ. J., dated Feb. 28, 2003 ("WMA Mem."), at 8 n. 5.)

[147] Minneapolis, Detroit, New York and Los Angeles are not listed as "Magic." (Pls.' Resp. WMA Ex. 19.)

membership in the BPA. (Maxwell Letter from BPA to Mr. E. Johnson, dated Aug. 24, 1998, Pls.' WMA Resp. Ex. 24; *see also* E. Johnson Decl., McCabe Decl. Ex. 3, ¶¶ 4, 8.) A letter dated as of September 1, 1998, from WMA acting as agent for Maxwell to MJP asked MJP to confirm its agreement that in exchange for a $350,000 advance to Maxwell, MJP would contract with each local promoter to receive 50% of any promoter profit and to assume 50% of any promoter loss incurred. (Pls.' Resp. WMA Ex. 23.) A later WMA tour schedule, dated September 11, 1998, shows sixteen cities with firm offers from MJE (Magic Johnson Enterprises) and local promoters, in which eight shows had black local co-promoters. (*Id.* Ex. 20.)

On September 3, 1998, Mr. Rowe wrote Randy Hoffman of Hoffman Entertainers, Maxwell's managers, on BPA letterhead, stating the BPA would protest and boycott the Maxwell tour. The letter indicates copies were sent to Magic Johnson, Maxwell, WMA, various publications and a number of civil rights leaders.[148] (Letter from BPA to Mr. Hoffman, dated Sept. 3, 1998, Pls.' Rev. Jam Mem. Ex. 1G; *see also* E. Johnson Decl., McCabe Decl. Ex. 3, ¶ 7.) On September 8, 1998, Mr. King for First Class Productions and as Secretary of the BPA sent another letter to Mr. Hoffman stating, "YOU NOW HAVE BUT ONE CHOICE. STOP YOUR WICKED WAYS OR FUEL OUR POWER WITH YOUR RACIST TACTICS. . . ." (Pls.' WMA Ex. 128.)

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[148] On September 4, 1998, Mr. Frasco of WMA sent a memo to all promoters informing them that Magic Johnson Promotions would be a 50% promoter on all Maxwell deals, that tickets would read "Magic Johnson Productions in association with local promoter Presents," that the Black Entertainment Network would be the tour sponsor, and that Billy Sparks, a black promoter, would approve all radio and media advertising. (Pls.' WMA Resp. Ex. 22.)

The Maxwell 1998 tour was cancelled, but a tour was rescheduled in 1999. (E. Johnson Decl., McCabe Decl. Ex. 3, ¶ 8.) Magic Johnson states specifically that, with respect to the 1999 Maxwell tour, MJP "submitted a competitive offer to booking agency [WMA] that was accepted by Maxwell's management." (*Id.* ¶ 5.) On June 15, 1999, Jeff Frasco of WMA sent a memo to "all promoters" stating MJP is a 50% co-promoter on all dates and:

> All advertising must read, "Magic Johnson Productions in association with [local promoter] Presents Maxwell."
>
> BET (Black Entertainment Television) is the tour sponsor. . . .
>
> All marketing plans, radio promotion, and advertising must be approved by Billy Sparks prior to the on-sale. . . .

(Pls.' Resp. WMA Ex. 25.)

In connection with the 1998 Maxwell tour, Plaintiffs have failed to present a prima facie case of discrimination under *McDonnell Douglas.* Plaintiffs have failed to provide evidence to contradict Mr. Frasco's testimony that Maxwell's management, not WMA, rejected their offers. Even assuming that there was evidence showing that WMA had contributed to that decision, the circumstances do not give rise to an inference of racial discrimination because, instead of Mr. Rowe, a black promoter was hired as the national promoter for the 1998 Maxwell tour. In their Memorandum of Law in Support of their Motion for Summary Judgment, WMA acknowledges Mr. Rowe's offer for seven cities (Pls.' Resp. WMA Ex. 18), and Mr. Jones's offer for three cities (Memphis, Nashville, Norfolk/Hampton) "whenever

there is a tour for Maxwell" (Letter from Fred Jones to Jeff Frasco of WMA, dated July 6, 1998, in J.A., Vol. II, Ex. 5). (WMA Mem. at 8 n. 5.) However, it is unrebutted that, as Mr. Frasco testified, he forwarded any offer expressing interest in the tour to Mr. Hoffman, Maxwell's manager (Frasco Dep., in J.A., Vol. IV, at 119-20), and that Mr. Hoffman and Maxwell were the ultimate decision makers in choosing promoters for Maxwell's tour engagements (WMA 56.1 Stmt. ¶57;[149] Frasco Dep., in J.A., Vol. IV, at 97). It is also unrebutted that Mr. Hoffman and Maxwell hired MJP as the national tour promoter for the 1998 Maxwell tour[150] (WMA 56.1 Stmt. ¶¶57-59; King Dep., in J.A., Vol.V, at 588, 597, 1098-99; Frasco Dep., in J.A., Vol. IV, at 97, 100-01, 125; Grosslight Dep., in J.A., Vol. IV, at 122-24), and that MJP is owned and operated by African Americans ((E. Johnson Decl., McCabe Decl. Ex. 3, ¶6).[151] Additionally, the 1998 Maxwell tour was cancelled. Thus,

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[149] Plaintiffs dispute this statement, but only cite the affidavit of Mr. R. Johnson, who worked as a booking agent at WMA from 1982 to 1986, to support this contention. (Pls.' Am. Local Rule 56.1 Stmt. of Disputed Facts in Supp. of Opp'n to WMA's Mot. for Summ. J., dated June 16, 2003 ("Pls.' Am. WMA Stmt."), ¶57 (citing R. Johnson Aff., Pls.' WMA Ex. 9, ¶3).) As stated previously, Mr. R. Johnson's testimony is admitted as far as it relates to his personal knowledge, which does not extend to the 1998 Maxwell tour. WMA 56.1 Statement ¶57 is considered as if undisputed.

[150] Even if Plaintiffs had shown a prima facie case of discrimination, Mr. Frasco's testimony sets forth a valid business reason, a decision by the principal to reject the Plaintiffs' offers. *See McDonnell Douglas*, 411 U.S. at 804. Plaintiffs do not offer any evidence to show that the reasons for choosing MJP were pretextual.

[151] Mr. Frasco also testified that Mr. Hoffman decided that Mr. Jones would be involved as a copromoter if Maxwell played in any of the cities Mr. Jones "normally plays." (Frasco Dep., in J.A., Vol. IV, at 127.)

Plaintiffs have no claim under § 1981 for race discrimination for the cancelled 1998 Maxwell tour.

As for the 1999 Maxwell tour, Plaintiffs maintain that the total of Mr. Rowe's "firm" offers in his July 20, 1998 letter for the 1998 Maxwell tour was greater by $100,000 than the guarantees of the "dominant" white promoters who were later awarded concerts for the 1999 tour. (Pls.' WMA 56.1 Stmt. ¶ 110 (citing Pls.' Resp. WMA Ex. 19 (WMA Doc. of 8/5/99),[152] Ex. 20 (WMA Doc. of 9/11/98); *see also* Rowe WMA Aff., Pls.' WMA Ex. 1, ¶ 21.) However, a comparison of these offers cannot be made because: (1) Rowe's offer (Exhibit 18) was for 1998 and did not contain proposals for the artist/promoter split, venues, venue capacity or ticket price;[153] (2) Exhibit 19 and Exhibit 20 do not reflect MJP's advance of $350,000 or the guarantees of the local promoters for the 1999 tour, and (3) Rowe Entertainment made no offer for Maxwell's 1999 tour (Rowe Dep., in J.A., Vol. VI, at 1221), when another year had passed since Maxwell was named Rolling Stones Breakthrough Artist of the Year (1996). As Mr. Rowe did not bid on the 1999 Maxwell tour, he has not provided evidence to form a prima facie case of racial discrimination by WMA under *McDonnell Douglas.*

In connection with the 1999 tour, Plaintiff Jones did submit a bid to promote Maxwell on September 16, 1999 at the Grand Old Opry House in Nashville, "if Maxwell performed there." (Letter from Fred Jones to Jeff Frasco of WMA, dated Sept. 16, 1999, in J.A., Vol. II, Ex. 39.) Plaintiffs, however, have not submitted evidence to show

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[152] Exhibit 19 is dated 8/5/98, not 8/5/99.

[153] Guarantees cover the artist in the event the concert is not successful. The artist promoter split, venue capacity, and ticket prices allow the artist to benefit from a successful concert.

that Maxwell performed there or in the other cities included in Mr. Jones's offer for the 1998 Maxwell tour. Accordingly, Plaintiff Jones has also failed to provide evidence of a prima facie case for a violation of 42 U.S.C. § 1981.[154]

As to Plaintiffs' claim that WMA conspired with other defendants to exclude them from the 1999 Maxwell tour, it is unrebutted that Maxwell and his manager, Randy Hoffman, made the selection of MJP as the Maxwell tour promoter and of the local promoters for Maxwell's 1998 and 1999 tour engagements. Plaintiffs have presented no evidence suggesting that WMA and other defendants conspired to engage MJP in order to exclude Plaintiffs because of their race. It is undisputed that MJP is owned and managed by African Americans. (E. Johnson Decl., McCabe Decl. Ex. 3, ¶6.) In addition to MJP, the following black promoters were retained in local markets to co-promote concerts on the 1999 Maxwell tour: Bill Washington co-promoted nine shows; Lionel Bea co-promoted two shows; Clarence Jones co-promoted two shows; and Plaintiff Boseman co-promoted one show in Virginia with MJP and Cellar Door Concerts. (Johnson Decl., McCabe Decl. Ex. 3, ¶8; Boseman Dep., in J.A., Vol. III, at 762-64; Letter from Berkeley Reinhold of WMA to Mr. Robinson, Mr. Boseman. and Mr. O'Connell, dated Apr. 17, 1999, J.A., Vol. II, Ex. 35 (amending contract between Sun Song and MJP to include Cellar Door Productions (Sun Song 25%, MJP 50% and Cellar Door 25%).) Additionally, Maxwell and his manager hired Billy Sparks, an African American, to coordinate the marketing and promotional radio activity for the 1999 Maxwell tour and hired BET Television. (Sparks Dep., in J.A., Vol. VI, at 24-25, 41-42; Frasco Dep., in

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[154] Plaintiff King testified he did not submit a bid to promote the 1999 Maxwell tour. (King Dep., in J.A., Vol.V, at 1101.)

J.A., Vol. IV, at 217-19.) Accordingly, Plaintiffs have failed to show that in relation to the 1998 and 1999 Maxwell tour there was a conspiracy by WMA and others to discriminate against Plaintiffs because of their race.

A reasonable jury could not find an inference based on the evidence presented on this motion that Defendant WMA intentionally discriminated against any of the Plaintiffs in making a contract, or interfered with Plaintiffs making a contract, to promote the Maxwell Tour in 1998 or 1999 because of any Plaintiff's race in violation of 42 U.S.C. § 1981 or conspired with others to deny plaintiffs equal protection of the laws or equal privileges and immunities under the law in violation of 42 U.S.C. § 1985(3).

(iii) Plaintiffs' Claims Regarding Erykah Badu

Paragraph 87(c) of the Amended Complaint reads as follows:

> In connection with concerts to be given by the Grammy award-winning R & B performer, Erykah Badu, a black performer, and not long prior to release of Ms. Badu's debut album in early 1997, plaintiff Jesse Boseman telephoned Badu's agent, Cara Lewis at William Morris, and asked to promote Badu's concerts at either of the two New York City venues on specific dates. Lewis, who personally knows Boseman, denied that Badu was scheduling concerts. In or about March 1997, Mr. Boseman asked Ron Delsener of Delsener/Slater to telephone Lewis and inquire whether Badu was scheduling concerts. Delsener thereupon telephoned Lewis and was informed that Badu was in fact scheduling concerts and, in Boseman's presence, Delsener obtained

> from Lewis the right to promote a May 1997 concert to be given by Badu at the Supper Club in New York City. After Badu's second album was released in November 1997, the BPA telephoned Lewis at William Morris to request concert dates for Badu's 1998 tour. Lewis assured the BPA that there were no concert dates planned. Within a month thereafter, however, the promoter defendants were assigned numerous Badu tour dates by William Morris.

(Am.Compl.¶ 87(c).)

Mr. Boseman testified that possibly as early as January 1997 he had called Cara Lewis, WMA's agent in charge of R & B acts, and asked to promote Ms. Badu at the Theatre at Madison Square Garden[155] or the Beacon Theater. (Boseman Dep., in J.A., Vol. III, at 715, 721-22.) According to Mr. Boseman, Ms. Lewis stated Ms. Badu wasn't going to tour and, therefore, he did not propose dates or other venues. (*Id.* at 722-23.) He also testified that later, in March 1997,[156] when he was in the office of former promoter defendant Delsener/Slater with Mr. Delsener and Mr. Slater, Mr. Slater[157] called Cara Lewis about Ms. Badu's availability. (*Id.* at 729, 732.) According to Mr. Boseman, Mr. Slater said "Ms. Lewis had told him that [Ms. Badu] was going to do

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155 In his deposition Mr. Boseman refers to the Theatre as a venue relating to the Paramount, but all further references by Plaintiffs to this conversation refer to the Theatre at Madison Square Garden. (Boseman Dep., in J.A., Vol. III, at 721-22.)

156 Mr. Boseman said that the conversation between Mr. Slater and Ms. Lewis couldn't have been more than a week or two after a conversation he had had with Ms. Lewis and that he may have spoken to Ms. Lewis in both January 1997 and March 1997. (Boseman Dep., in J.A., Vol. III, at 733.)

157 The Amended Complaint alleges that Mr. Delsener made the call, not Mr. Slater, as Mr. Boseman states in his deposition.

some dates," but the venues and specific dates had not been decided. (*Id.* at 736.) Mr. Boseman further testified that, a week or two later, Mr. Delsener and Mr. Slater told him that "they had selected a venue and Ms. Lewis had told him also that if they do business with Sun Song, that she wouldn't do any business with them any further." (*Id.* at 737-38.)[158]

As for the concert promoter defendants who are alleged in Paragraph 87(c) of the Amended Complaint to have been "assigned numerous Badu tour dates by William Morris" within a month of the BPA November 1997 phone call regarding Ms. Badu's 1998 tour, Mr. Boseman could not identify any specific concert promoter defendant who had received these dates. (*Id.* at 745.) Mr. Boseman acknowledges he did not submit a bid for a Badu concert at any venue. (*Id.*)

Ms. Lewis's recollection was that when Mr. Boseman first called he asked about Ms. Badu playing the Apollo Theater and that, "[c]onsistent with management's career objectives for Ms. Badu, [she] advised Mr. Boseman that Ms. Badu was not playing at venues like the Apollo. . . . because she wanted to play only small clubs and general admissions rooms,"[159] (Decl. of Cara Lewis,

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158 What Mr. Delsener and Mr. Slater said Ms. Lewis told them is hearsay as to the truth of the statements made and must be disregarded for purposes of this motion. Plaintiffs offer no testimony from Mr. Delsener or Mr. Slater to support this attribution to Ms. Lewis.

159 Ms. Lewis's uncontradicted affidavit states that, although she has specialized in urban, contemporary music (primarily R & B, hip hop and rap music) for eleven years at Norby Walters and for the past thirteen years at WMA, has a 99% client base of African American artists, and had business relationships with numerous black promoters, she had had virtually no contact with any of the four Plaintiffs until 1997. (Lewis Decl. ¶¶ 3- 8.) Prior to 1997, none of the Plaintiffs had expressed an interest in promoting any of the clients she has rep-

dated Feb. 27, 2003 ("Lewis Decl."), ¶ 14; *see also* Dep. of Cara Lewis, dated Jan. 17, 2002, in J.A., Vol. V, at 314.) Ms. Lewis states, however, that if Mr. Boseman did call in January 1997, the statement that Ms. Badu was not doing any dates at that time was correct. (Lewis Decl. ¶ 15.) Ms. Lewis attaches to her declaration a schedule generated from WMA's concert database of all Ms. Badu's concert engagements for 1997, which shows that, other than appearing at an industry function in January, Ms. Badu did not perform any concert engagements in January and for a period of two months thereafter.[160] (*Id.* Ex. 1 (Erykah Badu Engagements 1997) at 1.) Ms. Badu's first concert engagements were on April 8 and 9, 1997, and were promoted by black concert promoters. (*Id.* ¶ 15, Ex. 1 at 1.) Ms. Badu made only two appearances in New York City, one at the Supper Club and another at Tramps. (*Id.* ¶ 16, Ex. 1 at 2.) Ms. Lewis states that both of these venues are booked exclusively by the building and, thus, no independent promoter could have promoted Ms. Badu at these venues.[161] (*Id.* ¶ 17.) Only five of Ms. Badu's forty-seven engagements in 1997 went to the former concert promoter defendants, and at least seven of her shows were promoted by black promoters. (*Id.* ¶ 19, Ex. 1.) Plaintiffs have offered no evidence in contradiction of Mr. Lewis's sworn statement.

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resented over the last 20 years, and Mr. Boseman has never submitted a bid for any of the artists she has represented. (*Id.* ¶¶ 6, 8.)

[160] It is the Court's understanding that industry functions hire their own promoters, and independent promoters do not compete to be hired by the artist or the artist's manager.

[161] Delsener/Slater did promote Ms. Badu at the Supper Club. (Lewis Decl. Ex. 1.) During the oral argument, Defendant's counsel asserted without contradiction that Delsener/Slater "controlled" the Supper Club and any artist wishing to perform in that venue would have to go through Delsener/Slater. (Hrg. Tr. 10/16/03 at 113.)

In regards to the 1997 concerts of Ms. Badu, Plaintiff Boseman has failed to present a prima facie case of discrimination under *McDonnell Douglas* because the evidence shows that no concerts were held at either of the two specific venues Mr. Boseman inquired about, the Theatre at Madison Square Garden (Paramount) and the Beacon Theatre. Both of these venues are too large be considered similar to the venues in which Ms. Badu played. (*See* Lewis Decl. ¶ 18.) Most importantly, Mr. Boseman failed to submit a bid for any Badu concerts after he learned that Ms. Badu would perform concerts at small venues and supper clubs.[162]

Plaintiffs' second claim alleges that after the release of Ms. Badu's second album in November 1997, the BPA (Mr. Rowe and Mr. Boseman) telephoned Ms. Lewis to request concert dates for Ms. Badu's 1998 tour and that

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[162] Even if Mr. Boseman argued that he was exempt from the specific bid requirement his claim would fail. Assuming that the standards for exemption from the specific bid requirement set forth in *Brown v. Coach Stores* and *Petrosino*, both cases concerning failure to promote in the employment context, apply in the contract discrimination context, Mr. Boseman has failed to present evidence to qualify for these exemptions. Under *Brown v. Coach Stores*, Mr. Boseman must present pattern and practice evidence showing that bidding would have been futile and identify a specific position (in this case, venue) he would have applied for "had the alleged discriminatory practice not existed." *Brown v. Coach Stores*, 163 F.3d at 711. Mr. Boseman has presented no evidence demonstrating a pattern or practice of discrimination by WMA, and he has not identified any specific venue for which he would have applied. Under *Petrosino*, Mr. Boseman must demonstrate "that (1) the vacancy at issue was not posted, and (2) the employee either had (a) no knowledge of the vacancy before it was filled or (b) attempted to apply for it through informal procedures endorsed by the employer." *Petrosino*, 385 F.3d at 227. Mr. Boseman had knowledge that Ms. Badu was playing smaller venues, and thus, had the opportunity to submit a bid to WMA for Ms. Badu concerts at such venues.

Ms. Lewis stated there were no concert dates planned. (Am.Compl.¶ 87(c).) The Amended Complaint further alleges that Plaintiffs learned a month later that "the promoter defendants were assigned numerous Badu tour dates." (*Id.*) Ms. Lewis's declaration in response attaches a schedule from WMA's database of Ms. Badu's 1998 concerts, which support her statements and also show that none of the concert promoter defendants promoted Ms. Badu in 1998, contrary to Plaintiffs' allegation in paragraph 87(c).[163] (*Id.* Ex. 2 (Erykah Badu Engagements 1998).) Ms. Lewis states that Ms. Badu did not go on tour in 1998 but did schedule four individual engagements, three of which were promoted in-house by the venue itself (not by independent concert promoters). (Lewis Decl. ¶ 22.) The fourth date was copromoted by a black promoter, Al Wash. (*Id.*) Plaintiffs have offered no evidence in contradiction to these sworn statements by Ms. Lewis. Thus, Plaintiffs' claims that Ms. Lewis failed to give them the concert dates for Ms. Badu's 1998 tour and instead assigned them to the Promoter Defendants has no evidentiary support. Ms. Badu did not tour in 1998 and no dates were given to the Promoter Defendants. Instead in 1998 Ms. Badu scheduled only four concerts, and three of the concerts could not be promoted by independent concert promoters, such as Plaintiffs or the Promoter Defendants. Plaintiffs were not similarly situated to those who received the promotion opportunities. Lastly, the fourth concert was co-pro-

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[163] Attached to Ms. Lewis's declaration is a press release, which she states the BPA disseminated in 1998 to the media, stating that Ms. Badu was "allowing herself to be prostituted and exploited by the White Music Establishment," that "[h]er White Booking Agency refused to let her work for Black Promoters" and calling for a boycott of her recording products and concert appearances. (Lewis Decl. Ex. 3 (BPA Press Release).)

moted by a black promoter. On the above evidence, no rational juror could infer discrimination based on race from the actions of Ms. Lewis.

Finally, Ms. Lewis's declaration contradicts Plaintiff Jones's testimony that in 1998 that he spoke to her assistant and was told Ms. Badu was not playing any dates in Memphis, but later learned Ms. Badu had agreed to play in late April 1998 for Bob Kelley of Mid-South Concerts in Memphis. (Jones Dep., in J.A., Vol. IV, at 249-50.) Ms. Lewis attached two offers from Mr. Kelley generated from the WMA concert database for Badu concerts to take place at the Mid-South Fair in April 1998, which show one offer was rejected January 16, 1998, and the other February 9, 1998. (Lewis Decl. ¶ 26, Exs. 4, 5.) Since Mr. Jones's statement about what he learned in regards to the alleged April 1998 concert is hearsay and the unrebutted evidence shows that each of the offers by Mr. Kelley was rejected by Ms. Badu in or near January 1998, well before Mr. Kelley's suicide, Plaintiff Jones has not presented a prima facie case of discrimination under *McDonnell Douglas.*

(iv) Plaintiffs' Claims Regarding the Temptations and Other Groups

Paragraph 87(e) of the Amended Complaint reads as follows:

> In the late 1980's and the 1990's, William Morris excluded plaintiffs from promoting shows given by William Morris' black artists the Temptations, Barry White, Earth Wind & Fire, War and Lauren [sic] Hill. The promoter defendants were given promotion contracts for these acts. In 1998, Electric Factory was given the exclusive contract to promoter nationwide tours of Earth Wind & Fire and Barry

> White. Both of these acts were previously promoted by Rowe and Rowe Entertainment, and Electric Factory was aware of their earlier involvement with those groups, but excluded them.

(Am.Compl.¶ 87(e).)

The Plaintiffs have dismissed their claims against Electric Factory and present no evidence against it or WMA in support of their allegation. Since 1987, Mr. Rowe has never submitted a bid to WMA to promote a concert engagement by the Temptations. (Rowe Dep., in J.A., Vol. VI, at 1135-36.) Mr. Rowe has never submitted a bid to WMA to promote a concert by Barry White during the 1980s or 1990s. (*Id.* at 1225-26.) Plaintiffs have presented no evidence that Mr. Rowe or Rowe Entertainment bid for the nationwide tour of Earth, Wind & Fire in 1998, or at any other time. Mr. Rowe has never submitted a bid or called anyone at WMA to promote a concert by War during the 1980s or 1990s, and he testified that he did not want to promote a concert by War in the 1990s because War's "popularity fell off." (*Id.* at 1140.)

Mr. Boseman has never called a WMA agent to express an interest in promoting a concert engagement by the Temptations and never submitted a bid to promote the Temptations. (Boseman Dep., in J.A., Vol. III, at 769.) Mr. Boseman testified that he had no interest in promoting the Temptations because "[t]heir popularity was the years before I started promoting." (*Id.*) Mr. Boseman promoted Barry White in the early 1970s and on Mr. White's tour (which may have been in 1995, 1996, or 1997), and he does not recall "anybody at William Morris ever [telling him] not to put in a bid for Barry White." (*Id.* at 771.) Mr. Boseman never submitted a bid to WMA to promote a concert by Earth, Wind & Fire after 1988 (*id.* at 460), or a concert by War (*id.* at

772-73). He thinks he "might have passed" on promoting War. (*Id.* at 773.)

Plaintiff King has not submitted a bid to WMA to promote a concert by the Temptations, Barry White, War or Earth, Wind & Fire. (King Dep., in J.A., Vol. V, at 1115-18.) Mr. King testified that no one at WMA ever told him not to submit a bid to promote a concert by Earth, Wind & Fire or War. (*Id.*) Mr. King turned down an offer to promote a concert by Earth, Wind & Fire because he felt there was no demand for the show in Mississippi. (*Id.* at 741-42, 747-48.) Mr. King has never bid on a concert by a white artist represented by WMA, not because of anything a WMA agent did or said, but because lead Plaintiff Leonard Rowe and Plaintiff Jesse Boseman told him not to do so. (*Id.*, in J. Reply A., at 1066-67.)

Plaintiff Jones testified that he did not submit a bid on a concert by Barry White and never had any interest in being tour promoter for any artist. (Jones Dep., in J.A., Vol. IV, at 208-09.) Plaintiffs have presented no evidence that Mr. Jones expressed an interest to WMA for promotion of the concerts of the other artists mentioned in paragraph 87(e) of the Amended Complaint.

Plaintiffs have failed to present a prima facie case of discrimination under *McDonnell Douglas* in relation to the claims in paragraph 87(e), as they have not provided evidence of any specific promotion opportunity for which they submitted a bid and were rejected.

(v) Plaintiffs' Claims Involving Lauryn Hill

In their Response in Opposition to WMA's Motion for Summary Judgment, Plaintiffs further elaborate on the claim included in paragraph 87(e) of the Amended Complaint that WMA discriminated against Plaintiffs in relation to the artist Lauryn Hill. (Pls.' Resp. WMA at

23-24.) During discovery, Plaintiff Boseman asserted that Cara Lewis of WMA discriminated against him on the basis of his race in connection with the artist Lauryn Hill. (Boseman Dep., in J.A., Vol. III, at 685.) This assertion was based on conversations Mr. Boseman had with Ms. Lewis in March or April 1999, in which he mentioned his interest in being involved in a Lauryn Hill concert at the Theatre at Madison Square Garden.[164] (*Id.* at 329, 635-36, 638, 685-86, 690.) Mr. Boseman testified that despite being told by Ms. Lewis that he could be involved and that someone at WMA would contact him, Ms. Lewis gave the work to Mary Flowers, another black promoter. (*Id.* at 328-30, 635-36, 638, 640, 685-86.) Mr. Boseman did not submit a bid to promote any Lauryn Hill concert in 1999. (*Id.* at 1183-84.)

Also, Plaintiff Rowe testified that Ms. Lewis has discriminated against him on the basis of race in connection with Lauryn Hill, because he had submitted a "bid" to promote Ms. Hill in 1997 or the beginning of 1998. (Rowe Dep., in J.A., Vol. VI, at 1172-74.) Mr. Rowe testified that after sending in this bid, he met with Ms. Lewis, who told him he would be involved in some dates, but he never was. (*Id.*) During his deposition Mr. Rowe was unable to state the specific date, the venue, or any of the financial terms included in his bid and has not produced a copy of his bid to promote Ms. Hill. (*Id.*)

In her declaration, Ms. Lewis maintains that neither Mr. Rowe nor Mr. Boseman ever submitted a bid to promote a concert for Lauryn Hill. (Lewis Decl. ¶ 28.) She states that in 1999, Ms. Hill did individual concerts as well as a concert tour. (*Id.* ¶¶ 30-31.) The tour was pro-

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[164] Plaintiff Boseman also speaks of the venue Radio City Music Hall when referring to this concert.

moted by Al Haymon, a black promoter.[165] (*Id*. ¶30, Ex. 7.) Ms. Lewis has submitted a true and complete listing of Ms. Hill's concerts in 1999 from WMA's computerized concert records, showing that Delsener/Slater and Mary Flowers promoted Ms. Hill's concert at the Theatre at Madison Square Garden and that Mr. Haymon promoted three other individual concerts, in addition to the tour. (*Id.* Ex. 6.) Additionally, other black promoters, Lionel Bea, Bill Washington, Darryl Brooks, Anthony Williams, Earnest Booker and Magic Johnson Enterprises, promoted or co-promoted five Lauryn Hill concerts. (*Id.*)

Plaintiffs have failed to present evidence of a prima facie case of discrimination based on race under *McDonnell Douglas*. Plaintiffs Boseman and Rowe have not shown that they submitted a bid in relation to any Lauryn Hill concerts in 1999. Although Mr.Boseman expressed interest in a specific concert by Ms. Hill at the Theatre at Madison Square Garden, he testified that Ms. Lewis gave the "shows I normally do with Ron Delsener" to Ms. Flowers. (Boseman Dep., J.A., Vol. III, at 328.) Mr. Boseman's complaint is not that he was not awarded a contract for full promotion or lead promotion, but rather the work he would normally do was awarded to another black promoter. Since Mary Flowers, a black promoter, was the co-promoter for the concert at the Theater at Madison Square Garden, Mr. Boseman's claim that he was not the co-promoter due to discrimi-

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[165] Plaintiffs contend that Mr. Haymon sold his business to SFX in May of 1999 and thus, did not promote the tour. (Pls.' Resp. WMA Mem. at 24 n. 53.) However, SFX only acquired 50% of Mr. Haymon's business in May 1999 and a year later increased their ownership to 80%. (Haymon Dep., Ex. 86 in Pls.' Resp. WMA Exs., at 23.) Mr. Haymon stated that after the purchases by SFX, he ran the business in the same way. (Haymon Dep., in J. Reply A., at 162-163.)

nation based on race fails. Since Mr. Rowe cannot recall any specific information about his claimed bid and has not produced a copy, Plaintiffs have presented no evidence to show that his bid was equal to, but lost to, a white promoter's bid. Additionally, the substantial black concert promoter involvement in Ms. Hill's 1999 concert and concert tours, contradicts Plaintiffs' claim of intent to discriminate due to Plaintiffs' race.

(vi) Plaintiffs' Claims Regarding Mud Island

Plaintiffs maintain that WMA discriminated against Plaintiff Fred Jones when it prevented him from securing an exclusive contract for the Mud Island Amphitheatre and from promoting James Taylor at Mud Island. (Pls.' Resp. WMA at 19-21.) The facts related to the Mud Island claim are reviewed in the Beaver section, *supra* pp. 96-99.

Plaintiffs have failed to produce any evidence indicating that WMA interfered, or conspired with other Defendants to interfere, with Mr. Jones potential exclusive contract at Mud Island. As stated *supra* pp. 99-100, Mayor Herenton decided that it was in the best interest of Memphis to keep Mud Island open to all promoters and made this decision without the influence of any of the Defendants in this matter.

Plaintiffs argue that it is not a coincidence that on the same day (April 20, 1998) Mr. Jones sent WMA and other booking agencies a press release regarding his pending exclusive at Mud Island, Beaver sent a letter to the Memphis Park Commission asking that it not grant anyone an exclusive agreement on Mud Island and stating that if ' "an exclusive agreement is entered into with any other party, it will cause us to take our shows to other facilities in the market .' " (Pls.' Resp. WMA at 20 (quoting Leff letter, Pls.' WMA Ex. 141).) Mr. Jones

also testified that a day or so after he sent out his press release to WMA, he spoke with Mr. Shelly Schultz and Mr. Kenny DiCamillo and was told that WMA was cancelling the James Taylor concert at Mud Island. (Jones Dep., Pls.' WMA Ex. 49, at 350.) Plaintiffs have presented no direct evidence that WMA used information it received from anyone, including Plaintiff Jones, to interfere or to conspire with others to interfere with the Mud Island contract. Plaintiffs argue instead that Beaver's "threat" in its April 20, 1998 letter, to use other facilities in the market if an exclusive agreement for Mud Island was granted was in fact endorsed by WMA and that the simultaneous cancellation of James Taylor's performances at Mud Island evidences this endorsement. (Pls.' Resp. WMA at 20.)

On April 17, 1998, three days before Mr. Jones announced his pending exclusive and Mr. Leff's letter, and less than a month after Mr. Kelley's suicide, Mr. Schultz of WMA confirmed to Susan Green, who was the former vice president of Mr. Kelley's Mid-South Concerts and who had been hired by Beaver for their new office in Memphis, that WMA was "cancel[ling] the James Taylor engagement at Mud Island Amphitheatre on June 23-24, 1998" and rescheduling the James Taylor concert with "Don Fox in conjunction with [her] and [her] new organization" at Mid-South Coliseum on June 24, 1998. (Pls. WMA Ex. 124.)

Plaintiffs argue that "WMA switched venues in order to disguise its true intentions, which was to switch promoters and send a powerful message to the Commission regarding its intentions if it entered into an exclusive agreement with Jones." (Pls.' Resp. WMA at 21.) However, Plaintiffs have presented no evidence that WMA or Beaver or anyone else notified the Memphis Park Commission of the change of venue for the James Taylor

concert. Accordingly, Plaintiffs' argument is pure speculation. Plaintiffs have failed to offer testimony by Commission Officers Mr. Boyer and Mr. Malmo or by Ms. Green to support their arguments.

Plaintiffs also argue that WMA switched promoters to discriminate against Mr. Jones and drive him out of the Memphis market. (*Id.*) In response to this allegation, WMA presents the affidavit of Shelly Schultz, now a third-party witness, who states that WMA did not decide to switch promoters, but rather "Mr. Taylor's management decided to have Beaver promote Mr. Taylor's appearance in Memphis at the Mid-South Coliseum on June 24, 1998 because . . . . Beaver was going to promote Mr. Taylor's appearance on June 20, 1998 in Little Rock [and due to Mr. Kelley's suicide] we did not have a promoter at Mud Island." (Aff. of Sheldon Schultz, dated May 21, 2003 ("Schultz Aff."), ¶8.) Mr. Schultz further states that Mr. Taylor's management also made the decision "because we understood at that time that Bob Kelley's employees in Memphis, who would be involved in promotion, were being hired by Beaver." (*Id.*) Mr. Schultz also states that when he wrote the letter to Ms. Green, he "did not know of Mr. Jones, let alone know that he hoped to step in at Mud Island."[166] (*Id.* ¶9.) Mr. Schultz states that he only learned about Mr. Jones intentions and relationship with Mr. Kelley when he received the fax from Mr. Jones about the Mud Island exclusive sometime after April 21 or 22, 1998. (*Id.*) Additionally, Mr. Schultz states that at the time of Mr. Kelley's death, no written contract between Mr. Taylor and Island Events or Mid-South Concerts had been

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[166] Mr. Schultz states that he only spoke with Mr. Kelley or his employees at Mid-South Concerts, including Ms. Green, when his clients wished to play at Mud Island and that all concert related matters were handled by Mid-South employees. (Schultz Aff. ¶5.)

prepared or even negotiated, but rather that he and Mr. Kelley had an oral understanding that Mr. Taylor intended to appear at Mud Island on June 23 and 24, 1998 and that the building was on hold for those dates. (*Id.* ¶ 6.)

Plaintiffs have failed to present a prima facie case of discrimination against Mr. Jones by WMA in relation to the alleged switching of promoters for the James Taylor concerts. Although there was an oral understanding that Mr. Kelley would promote Mr. Taylor's concerts, there was no written contract. Additionally, Plaintiffs have failed to present evidence of WMA's awareness of Mr. Jones's intention to promote shows at Mud Island before Mr. Jones's April 21, 1998 fax. The decision to change venues occurred on April 17, 1998. Even if Plaintiffs had presented a prima facie case of discrimination in relation to Mr. Taylor's concerts, WMA has provided a good business reason for its action since its principal, Mr. Taylor and his management, decided to hire Beaver. Plaintiffs have not offered any evidence to show that this business reason for WMA's actions was a pretext. *McDonnell Douglas,* 411 U.S. at 804.

(vii) General Allegations of Discrimination by WMA

Plaintiffs in their Response in Opposition to WMA's Motion for Summary Judgment state that "WMA has not produced a single contract demonstrating that a black promoter has ever promoted a white artist whom it represented. Not one." (Pls.' Resp. WMA at 1.) To support this claim, Plaintiffs do not cite the discovery record but rather paragraph 17 of Mr. Rowe's affidavit, dated April 21, 2003, and paragraph 5 of Mr. King's affidavit, dated April 22, 2003, both presented in response to the Defendant WMA's motion. (*Id.*) These two parties' statements,

however, fail to mention evidence of the promotion of white artists represented by WMA by black promoters, which WMA had produced to Plaintiffs. This evidence includes: Darryl Brooks's promotion of Eminem (Joint 56.1 Stmt. ¶ 189);[167] Bill Washington's promotion of New Kids On The Block, The Average White Band and Santana (*id.* at ¶ 203); Larry Bailey's promotion of the Average White Band and WAR (*id.* at ¶ 201);[168] Mary Flowers's promotion of Tony Bennett (Grosslight Dep., attached as Ex. 29 to Pls.' Resp. WMA Exs., at 163); and Plaintiff Rowe's promotion of the Average White Band (*id.* at 206).

Similarly, Plaintiffs' brief asserts that "WMA does not require bids from its co-conspirators" and that "[t]he dearth of bids in WMA's files demonstrates that WMA does not solicit, receive or entertain competitive bids." (Pls.' Resp. WMA at 1.) This statement again is based on a conclusory statement in Mr. Rowe's affidavit. (*Id.*) Mr. Grosslight's declaration, however, shows that WMA produced to Plaintiffs its electronic database of concert bids received, which reflects 172,309 bids during the period from 1995 to 2001. (Grosslight Decl. II ¶ 13; *see also* Lewis Decl. Exs. 4, 5 (showing copies of alleged dominant promoter Mr. Kelley's two detailed rejected bids in WMA database).) Furthermore, the WMA electronic database shows a total of 87,502 bids were confirmed in the same period, of which only 7,275 bids were from the twenty-three former promoter defendants and 1,127 bids were from Jam and Beaver, while 79,100 confirmed bids were from non-defendant promoters.

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[167] Plaintiffs dispute Joint 56.1 Statement ¶ 189, but cite no evidence rebutting this claim as to this artist. This statement is considered as if undisputed.

[168] Plaintiffs dispute this statement, but their response is unresponsive. Joint 56.1 Statement ¶ 201 is considered as if undisputed.

(Grosslight Decl. II ¶ 15.) The record is clear that WMA receives competitive bids and that 90% of the confirmed bids were from non-defendant promoters. WMA's receipt of 90% of the confirmed bids from non-defendant promoters also contradicts Plaintiffs' assertion in their responsive brief that WMA "contact[s] only an elite fraternity of dominant white promoters," i.e., the Promoter Defendants in this action.[169] (Pls.' Resp. WMA at 1.)

Plaintiffs' claim that WMA "withhold[s] unsolicited competing bids from black promoters from its artists" is based apparently on the affidavit of a former WMA employee, who last worked in the industry in 1986. (Pls.' Resp. WMA at 1 (citing R. Johnson Aff., Pls .' WMA Ex. 9, ¶ 3).) Mr. Johnson, however, states that unsolicited bids received by a WMA agent from any "secondary promoter" (white or black) "would likely never leave his or her desk." (R. Johnson Aff., Pls.' WMA Ex. 9, ¶ 3.) Thus, even if the statement in the R. Johnson affidavit was related to a relevant time period, it does not support a claim of racial discrimination because both white and black promoters would have been affected by the practice described.

Plaintiffs also accuse WMA of "withholding information necessary for black promoters to submit competing bids" as part of its "gatekeeping powers." (Pls.' Resp. WMA at 7-8.) Plaintiffs fail to cite any evidence

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169 Furthermore, Plaintiffs have failed to present any evidence supporting its claims that WMA has "granted market domination to a small fraternity of dominant white promoters" (Pls.' Resp. WMA Mem. at 2) and has "unlawfully nurtured the dominant white promoters to great financial success" (*id.* at 7). To the contrary, Mr. Kapp's testimony, on which Plaintiffs rely as support for this conclusion, does not mention WMA. Mr. Kapp testified that the individual concert promoters, by purchasing venues and promoting as many shows as possible, have achieved dominant positions in each of their territories. (Kapp Dep., Pls.' Joint Mem. Ex. 12, at 230-33.)

to support this claim. They also fail to note that information about artists' concert plans can be obtained directly from the artists' manager, whose names and addresses are available in Pollstar directories. (*See* Stoll Dep., in J.A., Vol. VI, at 87 (noting that Amusement Business and Pollstar publish guides on artists' representation).) As to the gatekeeping accusation, the testimony of the artists, artists' managers and WMA witnesses is that all bids are referred to the artists' management or the artist for their consideration. (Brown Dep., in J. Reply A., at 51; Cosby Dep., in J. Reply A., at 13, 33; Grosslight Decl. I ¶ 17; Azoff Decl. ¶ 5; Lewis Decl. ¶ 12; Weisner Dep., in J.A., Vol. VI, at 26-27, 29.) Plaintiffs have presented no contrary evidence.

In support of the claim that they are excluded by WMA, Plaintiffs' brief cites a letter from WMA's Sheldon Schultz to thirty-nine white promoters, dated April 22, 1998, (Pls.' WMA Ex. 117) giving them a year's advance notice of plans for a 1998 tour of Culture Club and inviting them to a VH-1 taping. (Pls.' Resp. WMA at 7-8, n. 19.)[170] However, Plaintiffs do not refer to and

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[170] In this same footnote in their responsive memorandum, Plaintiffs cite a number of other letters that they claim demonstrate that WMA only contacted an "elite group of dominant white promoters to inform them of upcoming promotional opportunities and [to] make arrangements for their participation." (Pls.' Resp. WMA Mem. at 7-8, n. 19.) Plaintiffs base their assertion that "[n]one of these letters was sent to a single black promoter" on Mr. Rowe's affidavit. (*Id.*) Plaintiffs have chosen not to gather testimony relating to the circumstances relating to those letters and, thus, deprived the Defendants of the opportunity to present a legitimate business reason for contacting those particular promoters. Nor do those letters, selected from thousands of documents, raise an inference of racial discrimination since those letters were also not sent to the over 1,000 of the 1,042 independent white promoters identified in the Saad Study. (Saad Report, J.A., Vol. I, at 14.)

counter Mr. Schultz's explanation of why Plaintiffs did not receive such a letter. Plaintiffs have offered no evidence to controvert his testimony that the choice of promoters to whom this letter was sent was based on discussions with management along the way and was sent to "the promoters who worked with [Culture Club] in the past." (Dep. of Sheldon Schultz, dated June 11, 2002 ("Schultz Dep."), in J. Reply A., at 16-18.)[171] Since any promoter, whether black or white, who had not previously worked with Culture Club in the past did not receive notice, Plaintiffs have failed to show that "similarly situated non-minority members were treated differently." *See Johnson v. New York City Transit Auth.*, 639 F.Supp. 887, 893 (E.D.N.Y.1986), *aff'd in relevant part*, 823 F.2d 31 (2d Cir.1987). Thus, Plaintiffs have failed to meet their prima facie burden for this incident.

Plaintiffs also assert that WMA requires "more onerous deposit terms from black promoters." (Pls.' Resp. WMA at 1, 9-10) As stated *supra* pp. 83-86, 104-07, the Court's review of the contracts with Promoter Defendants Jam and Beaver shows that, although in some instances the deposit terms for contracts with the concert promoter defendants are 10% or less, instead of the 50% deposit Plaintiffs state is the industry standard and required of black promoters, the Promoter Defendants also are offered contracts by WMA calling for a 50% deposit.[172] (*See* Pls.' Rev. Jam Mem. Ex. 15; Pls.' Resp. Beaver Mem. Ex. 6E, 6F).) Plaintiffs claim that a pattern of disparity is evidenced by WMA's systematic exemp-

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171 Plaintiffs chose not to depose management of Culture Club to challenge Mr. Schultz's sworn testimony as pretextual.

172 As stated *supra* pp. 105-06, Plaintiffs have not shown that their selection of contracts is representative. Rather, the evidence shows that Plaintiffs choose the contracts that looked interesting to them.

tion of "white promoters from the standard deposit requirements," citing two letters from WMA explaining that certain promoters will not a pay a deposit. (Pls.' Resp. WMA Mem. at 10.) The evidence shows that non-concert promoter defendants such as Nederlander Theaters, which own a venue, will not pay a deposit. (Fax from Nancy Vance of WMA to Billie Bullock, manger for the Temptations, dated May 31, 1995 (stating "Nederlander does not pay deposits (never has, never will)"), Pls. WMA Ex. 114.) In this fax, WMA is merely advising the artist's manager of Nederlander's refusal to pay a deposit. Similarly, the evidence shows that Cellar Door will not pay a deposit for concerts performed at The Bayou. (Letter from Guy Richard of WMA to Dave Kaplan, manager of Brian Setzer Orchestra, dated July 3, 1996, Pls.' Resp. WMA Ex. 52.) Plaintiffs' Response WMA Exhibit 52 merely advises that Cellar Door, as a matter of policy, does not pay deposits on concerts at The Bayou. (Pls.' Resp. WMA Ex. 52.)

Plaintiffs have not provided evidence to show that the lower deposit is uniformly *offered* to the defendant Concert Promoters by WMA.[173] Many WMA form contracts

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[173] Plaintiffs, in their Memorandum in Response to WMA's motion, cite a number of exhibits containing contracts on WMA forms between artists and the alleged dominant promoters or letters from WMA to the alleged dominant promoters, which Plaintiffs claim are evidence of the "more onerous contractual terms" required of black promoters by WMA. (Pls.' Resp. WMA Mem. at 9-10.) Plaintiffs cannot show a prima facie case of discrimination under *McDonnell Douglas* using these exhibits, as they have not submitted any evidence showing they bid on any concerts related to the documents contained in the exhibits. Nor can Plaintiffs use these documents to demonstrate a pattern and practice of discrimination because they have selected these letters and contracts from thousands of documents.

Additionally, Plaintiffs do not cite to any testimony relating to the circumstances relevant to these exhibits by the parties involved or by any

submitted by Plaintiffs show that more favorable terms are the result of negotiations by the concert Promoter Defendants. *See supra* pp. 83-86, 104-07. Accordingly, since the concert Promoter Defendants are offered and often required to pay a 50% deposit, and other white concert promoters and often the alleged dominant white promoters pay the 50% deposit (Liss Dep., in J.A., Vol. V, at 136), no reasonable juror could draw the inference that Plaintiffs, who have not contracted to promote many concerts, are offered contracts calling for a 50% deposit because they are black.

Although there is evidence that many of the Defendants have done business together for years and that some of the individuals doing that business constitute a "fraternity" or "good old boy network" as Plaintiffs argue (Pls.' Resp. WMA at 7), there is no showing that these individuals are referred business by WMA in order to exclude the black promoters. (*See* Wavra Dep., in Pls.' Resp. WMA Ex. 88, at 39-47; Cooley Dep., in Pls.' Resp. WMA Ex. 85, at 96.) These longstanding relationships just as successfully exclude other white promoters.

Plaintiffs claim that "WMA is responsible for promoter selection by virtue of its power of persuasion." (Pls.' Resp. WMA Mem. at 5.) Plaintiffs have not provided any admissible evidence to show that WMA used its "power of persuasion" in connection with any alleged discrimination against them. Furthermore, Defendants

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WMA employees. Instead, Plaintiffs rely solely on Mr. Rowe's affidavit to assert that "[t]here is no legitimate business reason which can justify these disparate contractual terms WMA requires of black and white promoters." (Pls.' Resp. WMA Mem. at 9.) Plaintiffs evidently chose not to explore the facts and circumstances surrounding these exhibits. Plaintiffs' failure to inquire about these "disparate contract terms" and exhibits during oral discovery deprived the Defendants of the opportunity to show that a valid business reason existed for these disparate terms.

have offered evidence from artists' managers stating that they select the promoters. *See supra* note 36. Mr. Grosslight attaches the affidavit of Irving Azoff, dated December 15, 2000, in which Mr. Azoff states that he, and the artists he represents, state preferences for particular concert promoters depending on the local marketplace for each concert and then the artists' talent agent negotiates with one or several of those concert promoters on the artists' behalf. (Azoff Aff., Grosslight Decl. I Ex. 1, ¶ 5.)[174] Additionally, Mr. Grosslight points out that all the cities and venues from the Eagles Reunion Tour in the United States and all the promoters for the tour, other than two, were designated by the Eagles manager, Mr. Azoff.[175] (Grosslight Decl. I ¶ 9.)

Plaintiffs argue that "WMA broke the law and acted against the best interest of its clients" by not presenting competitive options to the Spice Girls' management for consideration in February 1998 in relation to the Spice Girls 1998 tour and that WMA took such actions in order to exclude Plaintiffs. (Pls.' Resp. WMA Mem. at 14-17.) Plaintiffs present no evidence to support their contention that WMA took the alleged actions to exclude Plaintiffs. Plaintiffs present no evidence of any communication between Plaintiffs and WMA in relation to the 1998 Spice Girls Tour. Thus, this claim is irrelevant to Plain-

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[174] Mr. Grosslight also states that WMA has written polices setting forth its commitment to equal opportunity and non-toleration of racial discrimination "in any form at [their] company whether it is by WMA employees, vendors or clients." (Grosslight Decl. I ¶ 12.)

[175] The two promoters that Mr. Grosslight remembered were not so designated were in Tupelo, Mississippi and Lafayette, Louisiana, not cities allegedly controlled by the dominant promoter defendants, and that in one case, he recommended a black promoter and in the other a Caucasian. (Grosslight Decl. I ¶ 9.)

tiffs claim of a conspiracy to exclude them from concert promotion on the basis of race.[176]

Similarly, Plaintiffs argue that WMA excluded black promoters from the Smokin' Grooves Tours, which were allegedly awarded to House of Blues (not a defendant in this action) every year until this action, in exchange for illegal remuneration. (Pls.' Resp. WMA Mem. at 17.) Mr. Rowe and Mr. Boseman both claim in their opposing affidavits that Ms. Lewis "rebuffed" their inquiries about the Smokin' Grooves Tours (Rowe WMA Aff., Pls.' Resp. WMA Ex. 1, ¶ 37, Boseman WMA Aff., Pls.' Resp. WMA Ex. 2, ¶ 12), but neither provided any specific facts to support this allegation. Once again, Plaintiffs' claim is irrelevant since Plaintiffs offer no testimony that they sought to bid on the Smokin' Grooves tour. Additionally, Plaintiffs chose not depose WMA about the documents they cite to obtain testimonial support for their conclusion. (Grosslight Decl. II ¶ 4.) In his declaration dated May 22, 2003, Mr. Grosslight refutes Plaintiffs' claim that House of Blues illegally remunerated WMA. (*Id.* ¶¶ 4-6.) Additionally, Mr. Grosslight explains that House of Blues was a presenter of the tours and that each individual date on the three tours was promoted by local promoters. (*Id.* ¶ 11.) Additionally, Darryl Brooks, a black promoter, promoted all twenty-six shows of the Smokin' Grooves tour in 1998, eliminating any claim that Plaintiffs were somehow denied the opportunity to promote due to their race.

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176 Additionally, Plaintiffs evidently chose not to make the documents upon which they base their claim the subject of interrogation during depositions. Thus, there is no testimonial support for their interpretation of the documents. Review of the documents suggests that Plaintiffs' interpretation is misleading. Furthermore, these claims seem to be subject to Magistrate Francis's order of preclusion dated July 8, 2002. (J.A., Vol.II, Ex. 43.)

(*Id.* ¶ 10.) Finally, this claim of Plaintiffs seems to be precluded under Magistrate Francis's order of preclusion, dated July 8, 2002. (J.A., Vol.II, Ex. 43.)

(viii) Plaintiffs Have Presented Insufficient Evidence to Survive Summary Judgment on Discrimination Claims

Plaintiffs' claims under 42 U.S.C. §§ 1981 and 1985(3) fail as they have not presented any facts from which any rational jury could infer intentional discrimination on the part of WMA, nor have they presented any evidence that WMA was a member of a conspiracy to discriminate against the Plaintiffs because of their race. Plaintiffs also allege a violation of 42 U.S.C. § 1986 against WMA for failure to act or prevent the conspiracy to discriminate against Plaintiffs. Plaintiffs have not shown that WMA had knowledge of any conspiracy to discriminate against Plaintiffs. Furthermore, claims under § 1986 can rest only on a predicate claim made out under § 1985. *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of New York, Inc.*, 968 F.2d 286, 292 (2d Cir.1992) ("Liability under § 1986 is derivative of § 1985 liability, i.e., there can be no violation of § 1986 without a violation of § 1985."). As the § 1985 claim was unsuccessful, WMA's motion for summary judgment on Plaintiffs' § 1986 claim will be granted.

2. *Creative Artists Agency, LLC's Motion for Summary Judgment*

The Amended Complaint contains three specific alleged violations of 42 U.S.C. § 1981 by CAA. The first claimed violation consists of CAA's alleged exclusion of Plaintiffs Boseman and Sun Song from promoting concerts, including the 1998 tour by the Artist formerly known as Prince ("Prince"). (Am.Compl.¶ 87(b).) The

second incident involves the alleged misrepresentation by CAA to Plaintiff Rowe in October 1996 that minimum artist guarantees of $225,000 to $275,000 per show with a 50% deposit were required from Plaintiffs for the 1997 Kenny G/Braxton tour, while the Defendant Promoters were awarded guarantees of only $150,000 to $175,000 per show and lower deposit terms. (*Id.* ¶87(f).) The third allegation involves CAA's alleged award of the 1998 Janet Jackson tour to Magicworks instead of Plaintiffs. (*Id.* ¶87(1).) The Amended Complaint also claims that "CAA has never solicited or permitted any black promoter, including plaintiffs, to promote, or even bid to promote a concert of contemporary music by a white act."[177] (*Id.* ¶19.)

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[177] In the Amended Complaint, Plaintiffs additionally assert:

> In or about May 1999, after this lawsuit was filed, CAA recently hired the first black agent in the history of the concert business to participate in booking white contemporary music acts. Dennis Ashley telephoned plaintiff Rowe and thanked him for bringing this lawsuit because, he said, it was the reason he was hired. He told Rowe that he was being treated like a king.

(Am.Compl.¶87(o).)

In their motion papers, Plaintiffs cite this statement and other instances involving CAA's hiring policy and work environment as evidence that "bolsters the plaintiffs' allegations of racial discrimination against CAA." (Pls.' Response in Opp'n to CAA's Mot. for Summ. J., dated Apr. 25, 2003 ("Pls.' CAA Mem."), at 21-22.) Mr. Ashley, however, testified that he did not know Mr. Rowe prior to his employment at CAA and never called Mr. Rowe to thank him for this lawsuit or his job. (CAA 56.1 Stmt. ¶121.) In any event, CAA's hiring of a black agent to participate in booking white contemporary music acts is not evidence of any discriminatory action by CAA against Plaintiffs. Additionally, CAA has a policy of equality and equal opportunity. (Dep. of Richard Lovett, dated Feb. 26, 2002 ("Lovett Dep."), in Pls.' CAA Dep. Tr., Vol. I, at 99-100 .) CAA has a strict policy against discrimination in employment and in all dealings with clients, vendors and the public. (Light Decl. I ¶5.)

Additionally, Plaintiffs' motion papers allege that CAA prevented, and conspired to prevent, Plaintiff Jones from obtaining an exclusive promotion contract at Mud Island in violation of 42 U.S .C. §§ 1981, 1985(3) and 1986. (Pls.' CAA Mem. at 19-20; *see also* Am. Compl. ¶ 87(k).) Also, their papers assert that CAA is part of conspiracy to exclude Plaintiffs and other black promoters from promoting white artists and superstar black artists. (Pls.' CAA Mem. at 1-7)

(i) Plaintiffs' Claims Regarding Prince

In the Amended Complaint, Plaintiffs allege:

> In the late 1970s, plaintiffs Jesse Boseman and Sun Song promoted concerts given by the Artist formerly known as Prince at a time when the Artist was merely the opening act for a then headlining performer, Rick James. In promoting such concerts, those plaintiffs helped the Artist achieve his own following. The Artist has now achieved star status, but his booking agency, CAA, now retains only promoter defendants to promote the Artist's concerts, including his 1998 tour.

(Am.Compl.¶ 87(b).)

In their motion papers, Plaintiffs claim that CAA represented Prince for tours in 1984, 1988, 1992, and 1994 without providing Plaintiffs the opportunity to bid, even though Mr. Boseman "made many requests [of] CAA to play Prince." (Pls.' CAA Mem. at 19 (relying on Boseman Dep.).) Mr. Boseman's deposition shows, however, that Mr. Boseman believes in 1981 and 1982 he spoke with "someone" at CAA, Inc., not CAA, LLC, on the telephone regarding Prince, but was told there were not any dates available at that time. (Boseman Dep., in J.A., Vol. III, at 920-22.) Mr. Boseman has provided no doc-

umentation regarding, or the date of, the telephone call, which took place well beyond the statute of limitations period. At some unspecified point in the mid 1990s, Mr. Boseman states he called either CAA, or WMA, to inquire about Prince, but then decided not to submit a bid because he felt the requested guarantee was too high. (CAA 56.1 Stmt. ¶ 114; Boseman Dep., in J.A., Vol. III, at 562-65.) Mr. Boseman does not claim to have had any other contact with CAA or CAA, Inc. regarding Prince. (*Id.* ¶ 115.)[178] Accordingly, Plaintiffs have not shown that Mr. Boseman applied for and was rejected for a concert promotion by CAA, as required to assert a prima face case against CAA under 42 U.S.C. § 1981.

Plaintiffs assert that "[b]lack promoters have rarely promoted Prince . . . . including while Prince was represented by CAA." (Pls.' CAA 56.1 Stmt. ¶ 236.) They offer no support for this claim except for Mr. Rowe's opposing affidavit. (*See id.* (citing Rowe CAA Aff. ¶ 149).) During his deposition, Mr. Sparks, a black promoter, testified that since 1995 he has advised Prince on which promoters to use, that Prince has not used booking agencies, and that Prince himself decides which promoters to use. (Sparks Dep., in J. Reply A., at 62.) Although Mr. Sparks testified that prior to 1993 the booking agencies chose the promoters (*id.* at 65), he also stated that he and Mr. Perry, another black promoter, were often asked by booking agents at CAA for concert promoter suggestions (*id.* at 66.).

Plaintiffs' only remaining claim is that CAA did not seek them out to represent Prince, but Plaintiffs offer no evidence or expert evidence or legal authority to show that CAA had any obligation to do so. Plaintiffs claim that "Boseman helped Prince achieve his own following"

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[178] Plaintiffs' reply is non-responsive; CAA 56.1 Stmt. ¶ 115 is considered as if undisputed.

(Pls.' CAA Mem. at 18), and thus, Mr. Boseman should have some right to promote Prince now. However, the only evidence of, or explanation provided for, Mr. Boseman's involvement is a reference to Mr. Boseman's promotion of Prince at some point before 1979. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶268.) CAA, LLC only came into existence in 1995, and Plaintiffs offer nothing to show that CAA, LLC had the benefit of CAA, Inc.'s knowledge of Mr. Boseman's prior involvement with promoting Prince. Although CAA, Inc. did represent Prince from 1984 to 1993 (Sparks Dep., in J.A., Vol. VI, at 83, 89), as Mr. Sparks, his manager testified, Prince stopped using any booking agencies in or around 1993. (CAA 56.1 Stmt. ¶117.) Plaintiffs have not attempted to develop any evidence to show that CAA (CAA, LLC), which first entered the booking agency business in October of 1995 (CAA 56.1 Stmt. ¶¶1-2; Light Dec. I ¶3), is liable for the acts of CAA, Inc. Lastly, paragraph 87(b) of the Amended Complaint makes reference to a 1998 Prince tour, but Plaintiffs admit in their memorandum in opposition that CAA did not represent Prince in 1998. (Pls.' CAA Mem. at 18.) Accordingly, paragraph 87(b) of the Amended Complaint is a totally unfounded claim against CAA.

(ii) Plaintiffs' Claims Regarding Toni Braxton

In paragraph 87(f) of the Amended Complaint, Plaintiffs allege that CAA discriminated against them in connection with the 1997 Kenny G/Toni Braxton tour.[179] In

[179] This claim is connected to Plaintiffs' general allegation that even when Plaintiffs have promoted black artists in the past, they are not given opportunity to promote these artists once they reach "star status." (*See* Am. Compl. ¶4.) Plaintiffs, however, have provided no evidence showing they in fact ever served as "promoters" for Toni Braxton previously. *See supra* p. 73.

their response papers, Plaintiffs claim that CAA misinformed Mr. Rowe concerning the bidding requirements, that black promoters were not given an opportunity to bid, and that white promoters received more favorable terms than those quoted to Plaintiffs. (Pls.' CAA Mem. at 7-13.) Under the undisputed facts reviewed *supra* pp. 73-76, Plaintiffs have not provided evidence that CAA discriminated against them.

In his deposition, Mr. Rowe testified that his initial conversation with Mr. Piranian of CAA took place in October or November of 1996 and that during this conversation Mr. Piranian demanded concert guarantees of $225,000 to $275,000 for major cities. (Rowe Dep., in J.A., Vol. VI, at 1382, 1384.) In his responsive affidavit, Mr. Rowe states that in 1996, before he spoke to Mr. Piranian, he had learned from Al Haymon that CAA was asking for guarantees of $250,000 to $275,000. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 215.)

The Defendants do not contest that Mr. Piranian was asking for concert bids containing guarantees within the $225,000 to $275,000 range at that time, but have provided evidence that in the fall of 1996, CAA was under instructions from Kenny G's manager, Turner Management, to make those demands to all promoters. (*See* Phillips Dep., in J.A., Vol. V, at 49-50; Light Dep., in J.A., Vol. V, at 472-75.) That other promoters were asked for such terms is buttressed by a contract between Radio City Music Hall and Turner Management, dated August 16, 1996, for six Kenny G/Braxton concerts for a per show guarantee of $280,000[180] (Light Decl. II Ex. 3) and a letter from Ken Scher of Nederlander to Carole Kinzel of CAA, dated October 25, 1996, confirming the terms

[180] This contract was revised by Dennis Turner, Kenny G's manager, in January 1997 to $232,597 per show. (Light Decl. II Ex. 4.)

and conditions of an agreement between Turner Management and Nederlander, which included a minimum artist guarantee of $225,000 and a 90/10 artist split, for a concert at Nederlander's auditorium in Anaheim, California (Light Decl. I Ex. 5). Plaintiffs have offered no evidence that CAA asked for lesser guarantees from white promoters when CAA asked for guarantees from Plaintiffs, which would support a prima facie case of discrimination under *McDonnell Douglas*. Even if they had met the burden of showing a prima facie case, Plaintiffs present no evidence to show that CAA's business reason, instructions from its principal, for demanding guarantees between $225,000 to $275,000 was a pretext. *McDonnell Douglas,* 411 U.S. at 804. Accordingly, Plaintiffs have offered no evidence showing CAA discriminated against Mr. Rowe and Mr. Boseman concerning the bidding requirements for the 1997 Kenny G/Braxton tour.

Plaintiffs' second point that black promoters were not given an opportunity to bid is also without an evidentiary foundation. In his responding affidavit, Mr. Rowe discloses that, prior to his discussion with Mr. Piranian, Mr. Haymon had advised him that CAA was asking for $225,000 to $275,000 guarantee per concert. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 215.) Mr. Haymon testified that there is no way to prevent a promoter from submitting a bid. (Haymon Dep., McCabe Decl. Ex. 11, at 48-49, 189-90, 252, 438.) Mr. Rowe testified that he discussed CAA's terms with Mr. Haymon, and they both believed the requested guarantee was too high. (Rowe Dep., in J.A., Vol. VI, at 1383.) Toni Braxton's manager testified that other "promoters balked" at these initial guarantees, and subsequently, Turner Management accepted lesser terms. (Phillips Dep., in J.A., Vol. V, at 50.) Thus, Mr. Rowe's own affidavit and his deposition

testimony demonstrates that he had the opportunity to bid but chose not to make an offer or a counter offer. Plaintiffs cannot, by other affidavits, seek to override their deposition testimony and claim they were not given an opportunity to bid. *Bickerstaff,* 196 F.3d at 455.

Plaintiffs next argue that the Kenny G/Braxton tour had been sold to white dominant promoters before Mr. Rowe even learned about the tour. (Pls.' CAA Mem. at 7 (citing Rowe CAA Aff. ¶ 215).) Mr. Rowe's affidavit states that concerts in Atlanta, Detroit, and Chicago had been sold at the time of his conversation,[181] but he does not state any basis for this belief. As it is not shown to be based on personal knowledge, it cannot be accepted as evidence in this case. Furthermore, the only evidence in the record as to these cities is a contract for Chicago with Defendant Jam, dated November 25, 1996 (Armand Decl. Ex. A), which would have occurred after the date of Mr. Rowe's conversation with Mr. Piranian in October or November 1996. (Rowe Dep., in J.A., Vol. VI, at 1384.)

As for Plaintiffs' claim that white promoters received more favorable terms than those quoted to Plaintiffs, again, this assertion is based on Mr. Rowe's affidavit. Whether it supports Plaintiffs claim depends upon the when the terms were offered. It is undisputed that after Turner Management's initial terms were not accepted, bids were accepted with lower guarantees. (Phillips Dep., in J.A., Vol. V, at 50.) Plaintiffs have failed to present evidence that at the time Mr. Piranian made the quotes containing the $225,000 to $275,000 guarantees to them that CAA was accepting bids from the dominant white promoters for lower guarantees. Plaintiffs have had access to all the CAA concert files, as well as email and hard drive discovery. Furthermore, Defendants have

[181] Mr. Rowe does not state to which concert he refers.

provided copies of contracts for Kenny G/Braxton concerts containing guarantees in this range. Plaintiffs have failed to provide proof of discriminatory terms being offered by CAA at the time of Plaintiffs' receipt of the terms demanded by Mr. Piranian.

Nor is there any evidence to support the Amended Complaint statement "no white promoter, including any of the promoter defendants promoting this tour, was required to submit a deposit of any more than 0-10% of the $150,000-$175,000 guarantee." (Am.Compl.87(f).) CAA has produced twenty concert promotion contracts, in which current defendant Jam and former defendant and non-party concert promoters contracted to pay pre-performance deposits of 50% of the guarantees for concerts on the 1997 Kenny G/Braxton Tour. (Armand Decl. ¶ 2, Ex. A.)[182] Thus, the contracts in evidence do not support an inference of race discrimination against

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[182] Jam's contract, dated November 25, 1996, with Kenny G and other contracts for the Kenny G/Toni Braxton concerts are on CAA's form contract and require the promoters to provide deposits based on the guarantees for Kenny G and do not provide separate guarantees for Toni Braxton. (*See* Armand Decl. Ex. A.) Plaintiffs have presented contracts on WMA forms that do not require the promoters to pay deposits for Ms. Braxton. *See supra* note 145. From the Court's review of these documents, the contracts on WMA forms secure Ms. Braxton's appearances at the Kenny G concerts, as required by the promoters' contracts with Turner Management.

Although many of the contracts presented by CAA provide for guarantees below the initial guarantee requested, Ms. Braxton's manager testified that many promoters felt that the initial guarantees were too high and submitted lesser bids. (Phillips Dep., in J.A., Vol. V, at 50.) Additionally, the evidence shows that black promoter Larry Bailey received a contract with $65,000 guarantee and 85/15 split with a $16,250 (25%) deposit by company check on March 11, 1997 (Armand Decl. Ex. B) and a contract for another venue with approximately the same terms on April 11, 1997 (Armand Decl. Ex. C).

Plaintiffs in connection with the Kenny G/Braxton tour in 1997.

(iii) Plaintiffs' Claims Regarding Janet Jackson

(a) Amended Complaint Claim

In the Amended Complaint, Plaintiffs allege:

> Defendant Magicworks was given the exclusive contract to promote a tour given by superstar black promoter, Janet Jackson, in 1998, by defendant CAA. Magicworks co-promoted the tour with the other promoter defendants. Several of the plaintiffs had previously promoted Janet Jackson shows in 1994, and had also promoted her superstar brother, Michael Jackson. Plaintiffs protested and were allowed to only co-promote shows in New York and Los Angeles with defendants Delsener/Slater and Magicworks.

(Am.Compl.¶ 87(1).)

(b) Review of Facts[183]

CAA was Janet Jackson's booking agency in connection with her 1998 concert tour.[184] (Light Decl. I ¶ 30;

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[183] Unless otherwise noted, the following facts are undisputed by testimony, affidavits or declarations of Plaintiffs, which are based on personal knowledge. Fed.R.Civ.P. 56(b).

[184] Plaintiffs claim that the alleged discrimination against them in relation to the 1998 Janet Jackson concert is connected to Plaintiffs' general allegation that even when Plaintiffs have promoted black artists in the past, they are not given opportunity to promote these artists once they reach "star status." (*See* Am. Compl. ¶ 4.) Al Haymon was lead promoter for the 1994 Janet Jackson tour, and Ms. Jackson was a CAA, Inc. client at that time. (Haymon Dep., in J.A., Vol. IV, at 123-24.) At his deposition, Plaintiff Rowe stated that he

CAA 56.1 Stmt. ¶69.) Roger Davies was Ms. Jackson's manager. (Light Decl. I ¶30.) Before the tour was sold to a national tour promoter, all material decisions relating to the tour were made by Mr. Davies, on behalf of Ms. Jackson, including decisions regarding financial terms, the selection of concert promoters and approval of routing. (*Id.* ¶31; CAA 56.1 Stmt. ¶71;[185] Light Dep., in J.A., Vol. V, at 118-19; Kinzel Dep., in J.A., Vol. V, at 97-99.) CAA encouraged the involvement of black promoters in Ms. Jackson's 1998 tour, and Mr. Light made this recommendation in several discussions with Mr. Davies. (Light Decl. I ¶32; CAA 56.1 Stmt. ¶72.[186]) Ms. Jackson and Mr. Davies agreed that it was important to involve black promoters in the tour and decided to require black representation on the tour as part of any deal. (Light Decl. I ¶32; CAA 56.1 Stmt. ¶72.) Therefore, in discussions about the tour, Mr. Light mentioned

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didn't know which Janet Jackson concerts he co-promoted in 1994 (Rowe Dep., in J.A., Vol. VI, at 541), but in his affidavit submitted in response to CAA's motion, Mr. Rowe states that he co-promoted Janet Jackson in 1994 with Mr. Haymon in Atlanta and Detroit (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶271). In his deposition, Mr. Boseman stated he co-promoted Ms. Jackson in 1994 in New York, put up a guarantee on the show, and provided services such as advertising and street production. (Boseman Dep., in J.A., Vol. III, at 1255-57.)

185 Plaintiffs dispute this statement, but cite the affidavit of Mr. Rowe for support. (Pls.' Resp. CAA 56.1 Stmt. ¶71.) Mr. Rowe has not been shown to have personal knowledge regarding this statement and does not cite any other source for this statement. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶230.) Thus, CAA's 56.1 Statement ¶71 is considered as if undisputed.

186 Plaintiffs dispute this statement in part, but only cite Mr. Rowe's affidavit submitted in response to this motion. (Pls.' Resp. CAA 56.1 Stmt. ¶72.) Mr. Rowe has not been shown to have personal knowledge regarding this statement and does not cite any other evidence for this statement. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶231.) Thus, CAA's 56.1 Statement ¶72 is considered as if undisputed.

to prospective buyers that Janet Jackson wanted to have black representation in the marketing and promotion of her concerts. (CAA 56.1 Stmt. ¶73;[187] Light Dep., in J.A., Vol. V, at 121-22, 128-29; Sparks Dep., in J.A., Vol. VI, at 118-26.) [188] Ms. Jackson and Mr. Davies initially asked for guarantees of $300,000 per concert. (Light Decl. I ¶32; CAA 56.1 Stmt. ¶74.[189]) Mr. Light had a number of conversations with Mr. Rowe regarding Ms. Jackson's 1998 tour and repeatedly encouraged him to submit a bid for the tour. (Light Decl. I ¶33; CAA 56.1 Stmt. ¶75.[190]) Based on the parameters set by Ms.

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187 Plaintiffs dispute this statement based on Mr. Rowe's affidavit stating that he was not told Ms. Jackson insisted on black promoter involvement. (Pls.' Resp. CAA 56.1 Stmt. ¶73 (citing Rowe CAA Aff., Pls.' CAA Ex. 1, ¶232).) However, in the letter Mr. Light sent Mr. Rowe on March 4, 1998, Mr. Light mentioned that there must be black involvement in each date. (Letter from Rob Light to Leonard Rowe, dated Mar. 4, 1998, Light Decl. I Ex. 13.) CAA's 56.1 Statement ¶73 is accepted as if undisputed.

188 Brad Wavra of Magicworks testified that someone at CAA raised the concern of involving black promoters on the 1998 Janet Jackson tour with him during negotiation of the Magicworks/Jackson contract, but he could not remember when, or whether they specified Ms. Jackson's concern about this. (Wavra Dep., in J.A., Vol. VI, at 135-36.) Prior to the 1998 Janet Jackson tour, Mr. Wavra had not included black promoters when he promoted black artists. (*Id.* at 141.)

189 Plaintiffs dispute this statement as based on inadmissible hearsay. The statement is offered only for the fact that it was made and therefore is not hearsay. *See infra* note 197. If admissible, Plaintiffs do not dispute that $300,000 was the amount, but dispute that Mr. Light was instructed about this. (Pls.' Resp. CAA 56.1 Stmt. ¶74.) Plaintiffs base this objection on Mr. Rowe's affidavit. Plaintiffs present no evidence to show that Mr. Rowe has personal knowledge of instructions given to Mr. Light, and, thus, Mr. Light's statement is considered as if undisputed.

190 Plaintiffs dispute this statement in part. Specifically, Plaintiffs deny that Mr. Light "encouraged" Mr. Rowe to send in a bid, but

Jackson and Mr. Davies, Mr. Light informed interested promoters, including Mr. Rowe, that Janet Jackson was seeking a guarantee of $300,000 per show. (Light Decl. I ¶ 32; CAA 56.1 Stmt. ¶ 76.[191])

In January 1998, CAA received a written proposal from Magicworks, dated January 27, 1998, to purchase the rights to produce a tour of forty shows by Ms. Jackson, supported by Boyz II Men, for a $16 million guarantee, including support talent. (Light Decl. I ¶ 34, Ex. 8; CAA 56.1 Stmt. ¶ 77.) CAA conveyed this offer to Mr. Davies. (Light Decl. I ¶ 34.) Magicworks's proposal called for Magicworks to act as producer of "a minimum of 40 dates in mutually agreed upon markets" and "an option of two 10 date additions at Four Million Dollars per [each 10 date] addition." (Light Decl. I Ex. 8.)

Around February 2, 1998, TNA International Ltd. ("TNA"), another large concert promoter company, submitted an offer directly to Ms. Jackson's management. (CAA 56.1 Stmt. ¶ 78.) TNA proposed to promote a fifty show tour by Ms. Jackson with a guarantee of $11.5 million. (*Id.*) TNA proposed cash sufficient to cover tour start up costs on signing with the balance of the guarantee to be paid by letter of credit drawn on a mutually acceptable bank. (*Id.; see also* Light Decl. I ¶ 32, Ex. 9.)

On or about February 10, 1998, Mr. Light received a letter from Mr. Rowe, on behalf of Rowe Productions, stating:

> It was indeed a pleasure speaking to you yesterday.
>
> I would like to make a firm offer of Three Hundred Thousand Dollars ($300,000) all inclusive to your

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they admit Mr. Light provided information about the tour to Mr. Rowe. (Pls.' Resp. CAA 56.1 Stmt. ¶ 75 (citing Rowe CAA Aff. ¶ 325).)

[191] Plaintiffs dispute this statement in the same manner they dispute CAA's 56.1 Statement ¶ 74.

> respective Artist, Janet Jackson for the markets listed. We are also open to the idea of co-promoting with Pop Promoters[192] in some markets. The markets are as follows: [listing twenty-nine cities].
>
> Please give this matter your immediate attention.

(Light Decl. I Ex. 10.)[193]

CAA forwarded Mr. Rowe's offer to Gillian and Rusty Hooker of Mr. Davies's office. (*Id.;* CAA 56.1 Stmt. ¶ 79;[194] Kinzel Decl. ¶ 5.)

In his declaration, Mr. Light states that he recommended to Mr. Rowe that he submit a more complete and definite offer. (Light Decl. I ¶ 37; CAA 56.1 Stmt. ¶ 80). Mr. Rowe states to the contrary, that after his February 10, 1998 letter, Mr. Light did not contact him by letter or

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[192] Mr. Rowe in his deposition refers to white promoters as Pop promoters.

[193] The letter constitutes an offer to produce a tour for Janet Jackson but does not contain dates or information relating to proposed financing, ticket prices or other items included in written offers for individual concerts. (Light Decl. I ¶ 36.) The total of this offer is $8.7 million.

[194] Plaintiffs dispute this statement, citing Mr. Rowe's affidavit stating that Mr. Rowe has not seen any document demonstrating that Mr. Light forwarded his offer. (Pls.' Resp. CAA 56.1 Stmt. ¶ 79 (citing Rowe CAA Aff. ¶ 234).) Plaintiffs claim that the "truth of Mr. Light's testimony is a question of fact for the jury." (*Id.; see also* Pls. CAA Mem. at 14 n. 22.) Ms. Kinzel states in her declaration, dated May 20, 2003, that Mr. Light forwarded her Mr. Rowe's letter and that she wrote "fax Gillian and Rusty" on the letter as an instruction to her assistant, who then faxed the letter to Rusty Hooker, who worked with Mr. Davies. (Kinzel Decl. ¶ 5.) Ms. Kinzel attaches a copy of the letter with a note, undisputedly in her handwriting, to her declaration. (Kinzel Decl. Ex. 2.) Plaintiffs have presented no evidence to contradict the testimony of Mr. Light or Ms. Kinzel, and, thus, the truth of statement is not controverted. *See Berman*, 986 F.Supp. at 200.

phone to recommend he send a more complete and definite offer. (Rowe CAA Decl. ¶236; Pls.' 56.1 Stmt. ¶80.)[195]

Nonetheless, on or about February 20, 1998, Mr. Light received another letter on BPA letterhead from Mr. Rowe, indicating that they had had a conversation after Mr. Rowe's February 10, 1998 letter and this time expressing the BPA's interest in being involved in twenty-eight markets on Ms. Jackson's 1998 tour. (Light Decl. I ¶38, Ex. 11.) The BPA letter states:

> Per our conversation I am submitting to you these markets that we would like to be involved in. Since you have no knowledge of whether the tour will be sold to a Tour Promoter or individual Promoters, I can not discuss the financial arrangement that I am willing to make at this time. But from my previous offer, you know that I am willing to offer a sizeable guarantee. I will provide more details concerning the guarantee when you provide me with more information about the tour. The markets are as follows: [listing 28 cities.]
>
> Please give this matter your immediate attention.

(Light Decl. I Ex. 11.)

Between January 25 and February 20, 1998, Magicworks submitted a number of revised proposals to produce Ms. Jackson's tour. (Light Decl. I ¶39; CAA 56.1 Stmt. ¶82.)[196] On February 25, 1998, CAA received a

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[195] Mr. Rowe's letter of February 20, 1998, (Light Decl. I Ex. 11), demonstrates that Mr. Rowe's statement in paragraph 236 of his responsive declaration is untrue.

[196] The head of CAA's Music Department recommended to Don Passman, Ms. Jackson's attorney, that Ms. Jackson would be better served by using individual promoters rather than a national tour pro-

revised bid from Magicworks offering an $11 million guarantee for forty shows by Janet Jackson supported by Usher, with a substantial up-front cash payment ($5 million to be paid at least forty-eight hours prior to first offer of tickets for sale) and $6 million secured by an irrevocable letter of direction to each of the venues to hold receipts of ticket sales totaling $150,000 in the name of Janet Jackson. (Light Decl. I ¶40, Ex. 12; CAA 56.1 Stmt. ¶83.)

Mr. Davies instructed CAA to inform the interested promoters that Ms. Jackson was looking for offers for forty dates with half the guarantee up front (prior to the first on sale date) and the remainder secured with an irrevocable letter of credit. (Light Decl. I ¶41; CAA 56.1 Stmt. ¶84.)[197] In his declaration, Mr. Light states, "[t]hereafter, I had another discussion with Mr. Rowe concerning the tour and, in accordance with Mr. Davies's instructions, informed him of the deal terms that Ms. Jackson was seeking and urged him to submit a comprehensive offer. I also told Mr. Rowe that we had received an offer for $11 million. CAA also continued to negotiate with Magicworks." (Light Decl. I ¶42; CAA 56.1 Stmt. ¶85.)

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moter such as Magicworks. (Dep. of Thomas Ross, dated Jan. 29, 2002 ("Ross Dep."), in J. Reply. A, at 152-54.)

[197] Plaintiffs claim that Mr. Davies's instructions to Mr. Light are hearsay is rejected. Mr. Light's declaration states it is based on personal knowledge (Light Decl. I ¶2), and statements of instructions received are admissible in evidence, not to prove the truth of the statements contained in those instructions, but rather to prove the fact that the instructions were received. Fed.R.Evid. 801(c); *see* Advisory Committee's Notes Subdivision (c) ("If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. *Emich Motors Corp. v. General Motors Corp.*, 181 F.2d 70 (7th Cir.1950), *rev'd on other grounds*, 340 U.S. 558.")

Mr. Light wrote a confirming letter, dated March 4, 1998, to Mr. Rowe, which reads as follows:

> As per our discussion, Janet Jackson has decided to use a national tour producer for her 1998 North American Tour. We are talking to all interested parties and inviting them to make an offer. As I mentioned, the basic parameters are as follows:
>
> - 40 dates
> - 10 truck show
> - sellable seat to 180 degrees
> - producer to pay for and contract support
> - 50% deposit to Artist prior to first on sale date, balance in a irrevocable letter of credit prior to first on sale date
> - advertising must use both pop and urban media outlets
> - there must be black representation in each date
>
> As I told you when we spoke, it is the Artist's desire to have all the offers in by the close of business Wednesday, March 4, 1998. The urgency is to allow a press conference to take place on March 12th and to go on sale quickly thereafter.
>
> The decision to use a national producer was reached over this past weekend and all interested parties are being given the same parameters. We appreciate your quick response.

(Light Decl. I Ex. 13 (Letter from Rob Light to Leonard Rowe, dated Mar. 4, 1998).)

Mr. Rowe did not respond to Mr. Light's letter of March 4, 1998. (Rowe Dep., in J.A., Vol. VI, at 1443.)

(c) Plaintiffs Have Failed to Present a Prima Facie Case of Discrimination with Respect to Mr. Light's Presentation of Tour Deal Terms to Mr. Rowe

Mr. Light's testimony that Ms. Jackson's management instructed him to present the deal terms for this tour to all interested promoters, including Mr. Rowe, constitutes a valid business reason for his presentation of these terms to Mr. Rowe. *McDonnell Douglas,* 411 U.S. at 804. Plaintiffs provide no evidence that Mr. Light's business reason was a mere pretext. Instead, Plaintiffs state in their response to CAA's 56.1 Statement that "Plaintiffs have no way on [sic] knowing whether Mr. Davies gave Mr. Light these instructions." (Pls.' Resp. CAA 56.1 Stmt. ¶84.) However, Plaintiffs could have utilized third party discovery. When Mr. Light was deposed on December 18, 2001, he was questioned about a declaration he had evidently executed previously, in which he stated that the basic parameters had been set by Ms. Jackson through her management for the Jackson tour and included forty dates, a 50% deposit prior to the first on-sale date, and the balance to be paid in an irrevocable letter of credit. (Light Dep., in J.A., Vol. V, at 118-119.) Plaintiffs also suggest that CAA did not propose to white promoters a guarantee of 50% in cash and the remainder secured by a letter for credit. (Pls.' CAA Mem. at 15.) Mr. Light, however, testified that the same proposal was given to other promoters interested in producing the tour and testified as to the identity of the other interested promoters he remembered—Magicworks, TNA, Metropolitan and BGB. (Light Dep., in J.A., Vol. V, at 119.) Plaintiffs offer no testimony from

Mr. Davies or these entities contradicting Mr. Light's testimony. That Ms. Jackson's management was attempting to obtain a letter of credit for the balance of the guarantee from Magicworks is confirmed by the cover letter, dated March 3, 1998, from Don Passman of Gang, Tyre, Ramer & Brown, attorneys for Janet Jackson and Mr. Davies, to Ms. Kinzel of CAA enclosing a draft deal memo (Light Dep., in J.A., Vol. V, at 130; Pls.' CAA Ex. 53 (stating "we have to resolve the letter of credit/guarantee issue before we can finalize"); *see also* Kinzel Dep., in J. Reply. A, at 189.) Accordingly, all the evidence shows that when Mr. Light conveyed Ms. Jackson's and Mr. Davies's instructions to Mr. Rowe on or before March 4, 1998, WMA was also seeking a letter of credit for the balance of the guarantee from Magicworks.

(d) Plaintiffs Have Failed to Present a Prima Facie Case of Discrimination in Relation to the "Delay" of Information

At his deposition, Mr. Rowe testified that he did not respond to Mr. Light's request to put up $11 million before the first ticket went on sale because he thought the terms were so outrageous and were intended to exclude black promoters. (Rowe Dep., in J.A., Vol. VI, at 1442-43.) He also testified that he discussed the terms Mr. Light relayed to him with BPA members, and they agreed with his decision not to pursue the matter. (*Id.* at 1443.) Mr. Rowe did not testify that he had not responded because he was not in a position to raise the funds for the requested guarantee terms by the end of the day. Also, Mr. Rowe did not claim lack of timely notice of Mr. Davies's terms in his letter to Mr. Light, dated April 9, 1998, on BPA letterhead. (Pls.' CAA Ex. 30.) Nevertheless, based on Mr. Rowe's responsive affidavit, Plaintiffs argue that CAA discriminated against them

based on their race in relation to the 1998 Janet Jackson tour because, they allege, Mr. Light delayed communicating the "basic parameters" of the tour to Mr. Rowe.[198] (Pls.' CAA Mem. at 15.)

In his answering affidavit, Mr. Rowe states he did not receive any notice of Ms. Jackson's proposed terms until March 4, 1998, and was given a deadline of the close of business on that same day to respond, less than 5 hours away. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶239.) Mr. Rowe also states that this time frame was not a fair chance to respond and that he was not given a chance to

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[198] Plaintiffs also claim that Mr. Light's March 4, 1998 letter was duplicitous because CAA had already sold the tour to Magicworks. (Pls.' CAA Mem. at 15; Rowe CAA Aff., Pls.' CAA Ex. 1, ¶243.) It appears that on March 3, 1998, Ms. Jackson and Mr. Davies still wanted a letter of credit for the balance of the guarantee from Magicworks. On March 3, 1998, Don Passman of Gang, Tyre, Ramer & Brown, Inc. (attorneys for Ms. Jackson and Mr. Davies) (Light Dep., in J.A., Vol. V, at 130) sent a draft deal memo to Ms. Kinzel of CAA, the cover letter to which states, "we have to resolve the letter of credit/guarantee issue before we can finalize. I need your input on a few points as well." The draft deal memo was for finalization "tomorrow." (Pls.' CAA Ex. 53.)

However, the evidence submitted on this motion demonstrates that the tour had not already been sold to Magicworks on March 4, 1998, as alleged by Mr. Rowe. On the afternoon of March 6, 1998, CAA received a copy of a letter from Gang, Tyre, Ramer & Brown, Inc., Ms. Jackson's attorneys, to Magicworks's attorneys, attaching an execution draft of the deal memo containing the provision for letters of direction, not letters of credit. (Light Decl. I Ex. 14.) So as of that date, the deal memo had not been executed. The formal contract with Magicworks was dated April 7, 1998. Mr. Rowe states that the final contract between Janet Jackson and Magicworks does not provide either for an irrevocable letter of credit or letter of direction. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶246 (citing Pls.' CAA Ex. 47); Pls.' CAA 56.1 Stmt. ¶357.) The Court's review of Plaintiffs' CAA Exhibit 47 shows that in fact letters of direction were required. (Pls.' CAA Ex. 47 at 4, 11.)

respond because Mr. Light knew that no black promoter could raise $12 million in five hours.[199] (*Id.* ¶ 241).

Mr. Light's letter of March 4, 1998, states that the decision to use a national promoter was reached during the previous weekend, but the letter does not state when the decision about the "basic parameters" was made. (Light Decl. I Ex. 13.) On March 3, 1998, one of the attorneys for Ms. Jackson and Mr. Davies (Light Dep., in J.A., Vol. V, at 130) sent a draft deal memo to Ms. Kinzel of CAA for internal purposes only, the cover letter to which states, "we have to resolve the letter of credit/guarantee issue before we can finalize." (Pls.' CAA Ex. 53.) Although this letter may not reflect upon the terms conveyed to Mr. Light by Mr. Davies, it indicates that on March 3, 1998, it was still an open question as to what the terms of the contract in regards to the letter of credit/guarantee issue would be, at least for Magicworks. Mr. Rowe, in his affidavit submitted in response, states that he first learned of these the terms on March 4, 1998 (which was a Wednesday), during a conversation with Mr. Light, which would have occurred, at the earliest, at noon in Atlanta.[200] (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 239.)

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[199] Although Mr. Rowe's answering affidavit states that Mr. Light told him that the total guarantee was $12 million, in his deposition, Mr. Rowe testified that the total guarantee he had to meet was $11 million, all cash up front with no letter of credit. (Rowe Dep., in J.A., Vol. VI, at 1441-45.) By his declaration in April 24, 2003, Mr. Rowe cannot, by stating another amount contradicting his deposition testimony in 2001 and the terms contained in the March 4, 1998 letter to Mr. Rowe from Mr. Light, create a triable issue of fact on that issue. *Bickerstaff*, 196 F .3d at 455.

[200] In his deposition, Mr. Rowe stated that this conversation occurred sometime after February 20, 1998, but did not specify a date. (Rowe Dep., in J.A., Vol. VI, at 1440.)

Although Plaintiffs have shown that Mr. Rowe submitted a bid for the 1998 Janet Jackson tour, Plaintiffs have failed to show that any "similarly situated non-minority individuals were treated differently" in relation to notification of terms. *Johnson v. New York City Transit Auth.*, 639 F.Supp. 887, 893 (E.D.N.Y.1986), *aff'd in relevant part,* 823 F.2d 31 (2d Cir.1987); *see also Hodge v. RCA Global Communications,* Nos. 93-261, 93-347, 1994 WL 240373, (S.D.N.Y. May 26, 1994). Plaintiffs had a full opportunity, during extensive discovery, to develop evidence demonstrating that a non-minority promoter received the "basic parameters" prior to Mr. Rowe's receipt of these terms. Thus, Plaintiffs have failed to present evidence raising an inference of racial discrimination due to Mr. Rowe's treatment by Mr. Light, including the alleged late notice of Ms. Jackson's terms.

(iv) Plaintiffs' Claims Regarding the Magicworks Tour

Plaintiffs further allege that CAA discriminated against them after Magicworks was awarded the 1998 Janet Jackson tour by refusing them promotion opportunities. (Pls.' CAA Mem. at 16.) Mr. Light states that from the beginning, he believed that Magicworks would partner with local promoters in certain markets to offset some of the risk it had assumed by agreeing to pay the financial guarantee for the entire national tour. (Light Decl. I ¶ 49; CAA 56.1 Stmt. ¶ 96.[201]) Magicworks deal

[201] Plaintiffs dispute this statement by stating that "whether [this] is true requires a credibility determination by the jury" (Pls.' Resp. CAA 56.1 Stmt. ¶ 96) and claim that Mr. Rowe's statement that Mr. Light never told Mr. Rowe he could offset his risk by partnering supports that Mr. Light's assertion is not true (*id.* (citing Rowe CAA Aff. ¶ 258).) The Court finds that this is not a genuine issue of mate-

memo, drafted by Ms. Jackson's law firm, contained a provision requiring Magicworks to "meaningfully involve black promoters in the tour." (Light Decl. I ¶48, Ex. 14; Light Dep., in J.A., Vol. V, at 131-33; CAA 56.1 Stmt. ¶95.)

After the Magicworks deal memo was finalized, Mr. Light informed Magicworks that Mr. Rowe had expressed interest in the tour and recommended that Magicworks consider involving Mr. Rowe. (Light Decl. I ¶50; CAA 56.1 Stmt. ¶97.)[202] On or about March 13, 1998, Mr. Wavra discussed the tour with Mr. Rowe and on several occasions invited Mr. Rowe and other members of the BPA to make concrete offers for any show. (Rowe Dep., in J.A., Vol. VI, at 1446; Light Decl. I Exs.

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rial fact. Mr. Rowe's bids for 29 cities with a $300,000 guarantee per city totaling $8.7 million would lead one to assume he would partner with local promoters to offset this risk. In fact Mr. Rowe states, "We are also open to the idea of co-promoting with Pop Promoters in some markets." (Light Decl. I Ex. 10.) As stated *supra* note 194, Plaintiffs must cite evidence to controvert Defendants' assertion, not merely claim credibility issues. *Berman*, 986 F.Supp. at 200.

202 Mr. Rowe maintains that the "only reason Mr. Light informed Magicworks that [he] had expressed an interest in the tour and 'recommended' that Magicworks consider involving him was because [Mr. Rowe], in a letter dated March 31, 1998, on behalf of the Black Promotion [sic] Association had threatened to boycott and picket." (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶259; Pls.' Resp. CAA 56.1 Stmt. ¶97; *see* Pls.' CAA Ex 54; Light Decl. I, Ex. 17.) However, Mr. Rowe does not demonstrate he has personal knowledge of when Mr. Light recommended to Mr. Wavra that he involve Mr. Rowe. Mr. Rowe's claim is conclusory and argumentative and must be disregarded. The rest of Mr. Light's declaration, that he had also suggested that Magicworks consider involving black promoters, Billy Sparks and Quentin Perry on the tour, is confirmed by these gentlemen. (Light Decl. I ¶50; Sparks Dep., in J.A., Vol. VI, at 33-34; CAA 56.1 Stmt. ¶98.)

15, 16; Wavra Dep., in J.A., Vol. VI, at 145-48; CAA 56.1 Stmt. ¶ 99.)

On March 16, 1998, Mr. Rowe wrote a letter to Mr. Wavra, on BPA letterhead, asking him to "do the right thing with the Black Promoters." (Light Decl. I ¶ 52, Ex. 15; CAA 56.1 Stmt. ¶ 100.) Mr. Wavra responded the same day offering the BPA the opportunity to participate in the tour, stating they were taking offers from local promoters and asking the BPA and its members to state which markets they were interested in. (Light Decl. I Ex. 16; CAA 56.1 Stmt. ¶ 101.[203]) The terms requested were a $375,000 guarantee, a 75/25 split for the "A" markets like New York, Chicago, Detroit, Washington D.C. and others, and a $325,000 guarantee and a 75/25 split for the other markets with 50% of the guarantee paid before the tickets go on sale and the balance due before the date of play or a letter of direction assigning the remaining receipts to Magicworks. (Light Decl. I Ex. 16). As recommended by Mr. Light, Magicworks hired Quentin Perry and Billy Sparks, both African Americans, as marketing consultants and promoters for certain dates around that same time. (CAA 56.1 Stmt. ¶ 103;[204] Light Decl. I ¶ 4, Ex. 22; Wavra Dep., in J.A., Vol. VI, at 150; Sparks Dep., in J.A., Vol. VI, at 37, 45.)

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[203] Plaintiffs do not dispute the above statement, although they dispute CAA 56.1 Statement ¶ 101 in part.

[204] Plaintiffs dispute that Mr. Perry and Mr. Sparks were hired as promoters and cite Plaintiffs' CAA Exhibit 55, which states "[w]e have hired Quinton [sic] Perry and Billy Sparks as our tour-marketing consultants," and the deposition of Mr. Sparks at page 96. (Pls.' Resp. CAA 56.1 Stmt. ¶ 103.) However, Mr. Sparks's statement on page 96 is in relation to Prince, not Janet Jackson, and at page 37 of this deposition he states he did promotions for the 1998 Janet Jackson tour. Additionally, Mr. Rowe admits that Mr. Perry co-promoted Janet Jackson concerts in Washington D.C. and Los Angeles. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 266.)

On March 31, 1998, Mr. Rowe sent Mr. Wavra a letter on BPA letterhead expressing concern about the fairness of the Janet Jackson tour and threatening to publicly label CAA and the tour as "discriminatory." Mr. Rowe attached a list of actions to be taken, including purchasing radio spots denouncing Janet Jackson's upcoming tour and calling for a boycott of the concerts on the tour. (Light Decl. I ¶ 55, Ex. 17; CAA 56.1 Stmt. ¶ 105; Rowe Dep., in J.A., Vol. VI, at 1446-47.)

Mr. Rowe received a responsive letter from Mr. Wavra the same day stating, in pertinent part, that:

> [a]s you know we have hired Quinten Perry and Billy Sparks to act as marketing consultants for this tour. . . . As far as promoters are concerned, I have stated before that we welcome all offers for Janet Jackson. The offers need to be in writing with appropriate scaling and ticket prices, building expenses, the guarantee and the back end of the deal. Until we have this we cannot respond. To date we have not received any offers from any of the members of the Black Promoters Association.
>
> Please forward the offers as soon as possible, as we are making decisions now.

(Light Decl. I Ex. 18; *see also* Rowe Dep., in J.A., Vol. VI, at 1448.)

By letter dated April 1, 1998, Mr. Boseman made an offer for 50% involvement in co-promotion for Janet Jackson's concerts on October 11 and 12, 1998 at Madison Square Garden at a guarantee of $400,000 and a 90/10 back end split. (Light Decl. I ¶ 57, Ex. 19; Boseman Dep., in J.A., Vol. III, at 354-55.) Attached to Mr. Boseman's letter is a memo from the BPA to Janet Jackson Management copied to civil rights leaders, accusing Ms. Jackson of betraying the African American com-

munity entrepreneurs who launched her career. (Light Decl. I Ex. 18.)

On April 3, 1998, Mr. Wavra sent another letter to Mr. Rowe encouraging members of the BPA to submit offers for any market and reiterating the financial terms being offered to all promoters. (Light Decl. I ¶58, Ex. 20; CAA 56.1 Stmt. ¶108.) Then, on April 6, 1998, Mr. Rowe, on behalf of the BPA for the first time presented Mr. Wavra with a written proposal for a share of the Washington, D.C. concert and a share of the Los Angeles concert. (Light Dec. I ¶59, Ex. 21; Rowe Dep., in J.A., Vol. VI, at 1450; CAA 56.1 Stmt. ¶109.)

Mr. Light discussed Mr. Rowe's proposal with Mr. Wavra and persuaded Magicworks to involve the BPA in Los Angeles and New York to overcome their threats to boycott, picket and disrupt the tour. (Light Decl. I ¶60; CAA 56.1 Stmt. ¶110.)

Mr. Light also spoke to Mr. Sparks and Mr. Perry, and they agreed to pay the BPA a fee of $100,000 out of their consulting fees. (CAA 56.1 Stmt. ¶111;[205] Light Decl. I ¶61; Sparks Dep., in J.A ., Vol. VI, at 44-46.) A memo from Magicworks, received by Mr. Light on or about April 10, 1998, confirmed that Mr. Sparks and Mr. Perry agreed to compensate BPA $100,000 from their marketing budget as co-promoters in those markets. (Light Decl. I ¶61, Ex. 27.) Mr. Rowe participated in concerts in Los Angeles and in New York through Mr. Boseman. (CAA 56.1 Stmt. ¶112;[206] Rowe CAA Aff. ¶265.)

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[205] Plaintiffs dispute this statement, but cite only paragraph 264 of Mr. Rowe's affidavit submitted in opposition to this motion. Mr. Rowe has not been shown to have personal knowledge as to what Mr. Light asked Mr. Perry and Mr. Sparks and, thus, CAA 56.1 Statement ¶264 is considered as if undisputed.

[206] Plaintiffs dispute this only to add that they were given different terms by Magicworks than Magicworks received from CAA.

Plaintiffs state that they were not allowed to participate in the promotion of the concerts produced by Magicworks on the 1998 Janet Jackson tour and that there was not "meaningful black involvement" in the promotion of each Janet Jackson concert on that tour. (Pls. CAA Mem. at 16-17.) Plaintiffs have failed to produce any evidence that CAA took any action detrimental to Plaintiff. Nor have they produced any evidence that CAA was in a position to control any action by Magicworks after Magicworks purchased the production of the tour and with whom Plaintiffs then communicated directly about possible involvement in the tour. Plaintiffs' denouncement of Ms. Jackson and her manager and their failure to present timely bids to Magicworks for additional concerts raise an inference that Plaintiffs were not seeking to maximize their participation in the promotion of the 1998 Janet Jackson tour.

Plaintiffs have submitted no evidence showing that CAA took any actions in connection with Magicworks production of the 1998 Janet Jackson tour that were discriminatory against Plaintiffs. Plaintiffs' claims against Magicworks are not before this Court.

(v) Plaintiffs' Claims Regarding Mud Island

As discussed previously in the sections concerning Beaver and WMA, Plaintiffs have presented no evidence of discrimination involved with the Plaintiff Jones's failure to contract for an exclusive arrangement at Mud Island Amphitheater, or that any of the defendants, including CAA, took any action that affected the Mayor's decision not to award an exclusive promotion contract for Mud Island. Even if evidence of discrimination by other Defendants had been found, Plaintiffs

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However, Magicworks contract was with Ms. Jackson's management and drafted by her attorneys.

have presented no evidence showing any connection between CAA and any of the Defendants alleged to be involved.

Although Mr. Jones sent the fax describing his exclusive at Mud Island to an agent at CAA (*See* Pls.' Beaver Ex. 1A (documents P00719, P007201)), the mere fact that CAA was notified by Mr. Jones of the anticipated exclusivity agreement is too tenuous a link to create even an inference that CAA somehow influenced Beaver's decision to open an office in Memphis, which occurred prior to the sending of the fax, or Mayor Herenton's decision. Plaintiffs have made no showing that CAA took any action to discriminate against Plaintiff Jones with respect to Mud Island.

(vi) Other Claims Against CAA

Plaintiffs also assert in their motion papers that CAA discriminated against them in the selection of concert promoters. There is very little evidence, however, that Plaintiffs were active in the market and made bids on concerts with CAA. Mr. Rowe admits that he "never contacted anyone at CAA prior to October or November of 1996" and has produced no copies of a bid for a concert to CAA.[207] (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶¶ 200-08.) Plaintiffs admit that: (1) Mr. Boseman has never submitted a bid to CAA for concerts of a white artist represented by CAA and has only made oral bids to CAA for CAA's black artists (Pls.' CAA 56.1 Stmt. ¶ 293);[208]

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[207] As discussed earlier, Mr. Rowe did submit two letters of interest for the 1998 Janet Jackson *tour.* (Light Decl. I Exs. 10, 11.) Also, Mr. Rowe did submit written bids to Magicworks for Janet Jackson concerts in Los Angeles and Washington, D.C. (Light Decl. Ex. 21; *see also* Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 262).)

[208] Mr. Boseman did submit a bid to Magicworks for 50% involvement in a New York concert on the 1998 Janet Jackson tour.

(2) Mr. King has never submitted a bid to promote an artist represented by CAA (*id.* ¶289); and (3) Mr. Jones has never submitted a bid to promote an artist represented by CAA (*id.* ¶298).

Mr. Light testified that since late 1996, when Mr. Rowe first contacted CAA, he has encouraged Mr. Rowe to submit bona fide offers to promote. (Light Decl. I ¶16.) Prior to bringing this suit, Mr. Rowe had submitted only the two letters in reference to the 1998 Janet Jackson tour to CAA. In July 2002, Mr. Light informed Mr. Rowe that Gloria Estefan was planning an October 2002 tour and offered Mr. Rowe an opportunity to bid. (*Id.* ¶18; CAA 56.1 Stmt. ¶38.) By letter of July 26, 2002, Mr. Light provided Mr. Rowe with the terms set forth by Ms. Estefan's management. (*Id.* ¶18, Ex. 2.) Mr. Rowe did not submit a bid because he did not think the tour would be profitable. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶207.)[209] In September 2002, Mr. Light spoke with Mr. Rowe and Mr. Boseman on the telephone to inform them that Stevie Wonder was planning to tour and asked them to submit a bid for any market. (CAA 56.1 Stmt. ¶38; Light Decl. I ¶19.) On September 6, 2002, Mr. Rowe for Rowe Entertainment submitted an offer for two shows at the Fox Theatre with guarantees

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(Boseman CAA Aff., Pls.' CAA Ex. 3, ¶19; *see also* Light Decl. Ex. 19.)

[209] Mr. Light has made another attempt to solicit bids from Plaintiffs. On June 27, 2002, Mr. Light forwarded Mr. Rowe a list of CAA clients who might be touring and invited Mr. Rowe to call him or submit offers for any artist. (CAA 56.1 Stmt. ¶38.) This statement is undisputed by Plaintiffs. (Pls.' Resp. CAA 56.1 Stmt. ¶38.) In the June 27, 2002 letter to Mr. Rowe, Mr. Light stated that the enclosed list "is an internal document which we do *not* normally send out to buyers [but] . . . . is being provided as a springboard for discussion." (Light Decl. I Ex. 1 (emphasis in original).) Mr. Rowe has not submitted any bids in response to this letter. (*Id.* ¶17.)

of $200,000 per show and an 85/15 artist split but included no date. (Pls.' CAA Ex. 45.) Shortly thereafter, however, Mr. Wonder cancelled his tour. (Light Decl. I ¶ 19.)

Dennis Ashley of CAA contacted Mr. Rowe about submitting bids for black artists Kelly Price, Mary J. Blige and K-Ci & Jo Jo. (Pls.' CAA 56.1 Stmt. ¶ 308.) Again, Mr. Rowe did not submit an offer because he states he did not think these artists would be profitable. (Rowe CAA Aff., Pls.' CAA Ex. 1, ¶ 208.)

Furthermore, contrary to Plaintiffs' allegations in paragraph 4 of the Amended Complaint, there is evidence that some of CAA's white artists have been promoted by black promoters. Larry Bailey has promoted Kiss, Harry Connick, Jr., Styx, and Three Dog Night, as well as Kenny G. (Joint 56.1 Stmt. ¶ 201;[210] *cf.* Pls.' CAA 56.1 Stmt. ¶¶ 166, 198, 218, 221.) Bill Washington has also promoted Santana (Joint 56.1 Stmt. ¶ 203), a Latin artist whom Plaintiffs cite as never having been promoted by a black promoter (Pls.' CAA 56.1 Stmt. ¶ 230).

Plaintiffs have submitted no evidence implicating CAA in the conspiracy alleged in the Amended Complaint. The vast majority of the Plaintiffs' Revised 56.1 Statement depends solely on statements in Mr. Rowe's affidavit[211] that are on matters outside the personal

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[210] Plaintiffs' reply is non-responsive; Joint 56.1 Statement ¶ 201 is considered as if undisputed.

[211] Almost half of Plaintiffs' CAA 56.1 Statement is based on Rowe's testimony. (*See* Pls.' CAA 56.1 Stmt. ¶¶ 1-5, 11-17, 19-37, 41, 43- 44, 46-48, 50-51, 53, 55-56, 58-59, 61-62, 145, 151-243, 261-65, 272-73, 276, 282-85, 287, 299, 300-02, 304-5, 307-08, 312-13, 318, 323-24, 326-27, 329-30, 332-33, 336-37, 340-42, 345-47, 349, 351-53, 355-56, 358-61, 363, 366, 370, 372, 376-78, 421-23 (relying solely on Mr. Rowe's CAA Aff. for evidentiary support).)

knowledge of Mr. Rowe, in violation of the requirements of the Federal Rules of Evidence and Local Civil Rule 56.1. Plaintiffs' Revised Statement of Undisputed Material Facts on this motion deals primarily with the concert promotion industry as a whole, reciting broad allegations, with an occasional insert of "including CAA."[212] There is no evidence that deals with specific actions on the part of CAA and any other defendant that infers the conspiracy alleged in the Amended Complaint.

One of Plaintiffs' claim of discrimination by CAA is that since CAA provides notice to some promoters of concert tours, as it did in order to procure venue holds in 1997 (*see* Pls.' CAA Ex. 22), they have an obligation to provide notice to all promoters.[213] In their motion papers, Plaintiffs assert:

> Moreover, because CAA provides advance notice of its artists' concerts to the dominant white promoters (see Comp. Ex. 22), it has a duty to provide that same notice in a non-discriminatory fashion to both black and white promoters. CAA's claim that it could not give advance notice to all active concert promoters is untrue because all it would have to do is send the same letter exemplified in Comp. Ex. 22 to all concert promoters instead of just the handful white chosen few. This would not be a herculean

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[212] *See, e.g.*, Pls.' CAA 56.1 Stmt. ¶¶8, 13-37, 39, 41, 44, 47, 49-70, 72-127, 129-41, 144-50, 244-45, 251-59, 312-13.

[213] Plaintiffs make additional allegations against CAA, but submit no evidence to support these statements beyond Rowe's affidavit, consisting of conclusory or irrelevant allegations. (*See, e.g.*, Pls.' Resp. CAA 56.1 Stmt. ¶9 ("CAA often allows the dominant white promoters to cut a side deal with Ticketmaster whereby the price of the ticket is increased by several dollars."); Pls.' Resp. CAA 56.1 Stmt. ¶9 (alleging that CAA contracts with corporate sponsors, such as The Coca-Cola Company, to the detriment of its artists).)

> task; all it would require is additional postage and the proper programming of a computer to include more names and addresses.

(Pls.' Resp. CAA 56.1 Stmt. ¶ 12 (citations omitted).)

Plaintiffs cite Mr. Rowe's affidavit rather than any legal authority to support their contention that CAA has a duty to notify all promoters of the artists interest in various venues in the following year. Plaintiffs' claim that CAA has such a duty overlooks the fact that CAA is an agent for each of their artist clients, and has a duty to act at the direction of, and in the best interest of, each of its clients, not the promoter. Plaintiffs present no evidence indicating that contacting the full list of independent contractors, which contains over 1,000 names (Saad Report, in J.A., Vol. I, at 14), would benefit artists in any way. Providing advance notice to all promoters of all concerts would be a formidable and costly endeavor. Additionally, while perhaps not a Herculean task, this widespread notice may create a heavy burden on artists' management who would then have the task of weighing the merits of each of the offers. It is within the discretion of the artists and their managers to decide whether such widespread notice to promoters would be in the artists' best interests.

(vii) CAA, LLC's Successor Liability for CAA, Inc.

Plaintiffs have not sought to make CAA, Inc., which is now known as OMH, Inc. ("OMH"), a party to this action. Plaintiffs nevertheless argue that CAA, LLC "is essentially the same company as CAA, Inc.," stating that CAA, LLC is "the same employees (minus Mike Ovitz and Bill Haver), the same business, the same clients, the same management, the same agents, [and] the same

building." (Pls.' CAA Mem. at 22.) Plaintiffs, however, fail to cite evidence supporting each of these allegations.

Plaintiffs and Defendants agree that federal common law, which governs the issue of successor liability for Title VII claims, should govern for claims under §§ 1981, 1985(3) and 1986. (CAA Mem. at 23; Pls.' CAA Mem. at 23 n. 36.) Plaintiffs argue that this Court should apply the test for successor liability first developed by the Sixth Circuit Courts in *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir.1974), as applied in *EEOC v. Local 638*, No. 71-287(RLC), 1988 WL 25151, at *7 (S.D.N.Y. Mar. 9, 1988). *Local 638*, however, involved successor liability following a merger, not a purchase of assets, as in this case.[214] *Local 638*, 1988 WL 25151, at *3.

Courts considering the appropriateness of imposing successor liability on a purchaser of assets (as distinguished from a purchaser of stock, who acquires the assets and liabilities of the seller) have focused on only two factors from *MacMillan Bloedel*. *See EEOC v. Barney Skanska Constr. Co.*, No. 99- 2001(DC), 2000 WL

[214] CAA is a Delaware limited liability company that was created on or about August 18, 1995. (CAA 56.1 Stmt. ¶ 1.) On or about October 1, 1995, CAA acquired certain assets of Creative Artists Agency, Inc., a California corporation now known as OMH, and commenced conducting a talent agency business. (Light Decl. 1 ¶ 3.) CAA's motion papers state, "CAA acquired *certain* assets of Creative Artists Agency, Inc." (CAA 56.1 Stmt. ¶ 2; Light Decl. 1 ¶ 3 (emphasis added).) Plaintiffs cite to CAA's Answer to the Amended Complaint, in which CAA stated that they "acquired *the* assets of Creative Artists Agency, Inc . . . . as of October 1, 1995." (Answer and Defenses of CAA to the Am. Compl., dated Aug. 15, 2000, ¶ 19 (emphasis added).) Since neither statement indicates that CAA, LLC acquired the liabilities of CAA, Inc. or merged with CAA, Inc., and since there is no showing that the owners of CAA, Inc. even became part of CAA, LLC, this argument over language is meaningless.

1617008, at (S.D.N.Y. Oct. 27, 2000) (applying a two factor test used in *Shevack v. Litton Applied Tech.*, No. 95-7740(JSM), 1998 WL 512959, at (S.D.N.Y. Aug. 19, 1998) to a Title VII case involving a purchase of selected assets.) To establish successor liability, two conditions must be satisfied: "(1) the successor had notice of the claim before acquisition; (2) there was a substantial continuity in the operation of the business before and after the sale." *Shevack*, 1998 WL 512959, at (citations omitted). The Plaintiffs have presented evidence that there has been some continuity in the operation of the business, even though the principals of CAA, Inc., Mike Ovitz and Bill Haver, have never been principals of CAA, LLC. (Dep. of Thomas Ross, dated Jan. 29, 2002 ("Ross Dep."), in Pls.' CAA Dep. Tr., Vol. II, at 12.) Many of the nine individuals, if not all, who became partners and took an equity interest in CAA, LLC, Lee Gabler, Kevin Heuvein, Bryan Lourd, Richard Lovett, Jay Maloney, Rick Nacita, David O'Connor, Jack Rapke and Thomas Ross (*id.* at 13-14), were employed by CAA, Inc.

Plaintiffs, however, have failed to present any evidence that the partners of, or anyone else at, CAA, LLC had notice of Plaintiffs' claims against CAA, Inc. before the purchase of assets took place. Plaintiffs have the burden of affirmatively showing that CAA, LLC "had notice of the claims." *Barney Skanska Constr.*, 2000 WL 1617008, at *3. Plaintiffs argue, without any citation to evidence, that CAA, LLC had notice because CAA, Inc. "had for years been violating the civil rights of black promoters." (Pls.' CAA Mem. at 24.) Not only does this conclusory statement provide no support for Plaintiffs' allegation of CAA, LLC's notice of these claims, which were not brought against it until November 18, 1998, it also does not provide any evidence of any discrimination

based on race by CAA, Inc. In any event, Plaintiffs have provided no evidence in any submission to this Court of any acts of discrimination against them based on race by CAA, Inc. and, thus, in this action, there is no evidence of any liability that could be acquired from CAA, Inc.

3. *Renaissance Entertainment, Inc.'s Motion for Summary Judgment*

Rather than allege that Renaissance committed any specific overt act of discrimination against Plaintiffs based on their race in violation of §§ 1981, 1985(3) and 1986, Plaintiffs allege general claims of discrimination and of participation in a conspiracy to discriminate against Plaintiffs by Renaissance. Plaintiffs claim that "Renaissance has excluded [them] from competing in the concert promotion industry [1] by contacting only an elite fraternity of dominant white promoters to promote its artists; [2] by requiring more onerous deposit terms for black promoters; and [3] by persuading its artists that they should use dominate white promoters to the exclusion of black promoters." (Pls.' Response to Renaissance's Mot. for Summ. J., dated Apr. 24, 2003, ("Pls.' Resp. Renaissance Mem.") at 1.) Plaintiffs also claim that Renaissance participated in the alleged conspiracy to exclude Plaintiff Fred Jones from securing an exclusive agreement at Mud Island and conspired to install Beaver as the dominant promoter in Memphis. (*Id.* at 13.)

In opposing Renaissance's motion for summary judgment, Plaintiffs state "there is overwhelming evidence that Renaissance engaged in unlawful discrimination. . . . aimed at preventing the Plaintiffs from promoting concerts by white artists and major black artists whom it represented." (*Id.* at 1.) However, not only have Plaintiffs failed to present evidence of a prima facie case of

discrimination by Renaissance in violation of § 1981, but they have also failed to present any evidence supporting any of their claims under §§ 1985(3) and 1986.

(i) Review of facts

Renaissance Entertainment, Inc. was formed in February 1996, but did not begin active concert promotions in this country until 1997. (Renaissance 56.1 Stmt. ¶¶ 1-2.)[215] Prior to Renaissance's commencement of operations in 1997, Mr. David Zedeck, the sole principal of Renaissance, had been working for the Famous Artists Agency in Europe and "had almost no experience as a booking agent in the United States and limited experience working with domestic concert promoters." (*Id.* ¶ 8.)[216] Renaissance ceased acting as a booking agency at the end of 1999, when Mr. Zedeck and a partner formed non-party Evolution Talent Agency, LLC ("Evolution") and purchased the assets of Renaissance. (*Id.* ¶ 4; Zedeck Dep., Pls.' Renaissance Ex. 25, at 9.)[217]

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[215] Plaintiffs dispute when Renaissance began active operations, asserting that active operations began in 1996. Plaintiffs cite some hearsay and the deposition of Mr. Zedeck to support their contention. Mr. Zedeck did testify that he booked dates for a few artists in 1996. (Zedeck Dep., in Pls.' Renaissance Ex. 25, at 36, 44-46.)

[216] Pls.' Resp. Renaissance's 56.1 Stmt. ¶ 8 is rejected as based on third party hearsay relating to Zedeck's earlier activities.

[217] Plaintiffs now claim that Mr. Zedeck's current agency Evolution should be joined in this action as a defendant. (Pls.' Resp. Renaissance Mem. at 11).) However, the only evidence before the Court is that Evolution acquired the assets of Renaissance as of December 31, 1999, and that Evolution cannot be claimed to be Renaissance's alter ego as it has other business and is owned by two separate individuals, one of whom is Mr. Zedeck. Plaintiffs offer no evidence to demonstrate that Evolution can be found to be the alter ego of Renaissance. Nor have they offered evidence that Evolution

(ii) Plaintiffs Have Failed to Present Any Evidence of a Violation of §§ 1981, 1985(3) or 1986

(a) Plaintiffs Have Failed to Present a Prima Facie of Discrimination by Renaissance

To prove a prima facie case of discrimination under the *McDonnell Douglas* test, Plaintiffs must prove that that they applied for a position for which they were qualified and that they were rejected. In this case, Plaintiffs provide no evidence showing that they bid for Renaissance's artists' concerts or tours. Mr. Zedeck states that before this action was filed in November 1998, Plaintiffs Rowe, King and Boseman never made an offer to promote a concert by an artist represented by Renaissance. (Zedeck Decl. I ¶¶ 12-13.) After meeting Mr. Rowe and Mr. Boseman for the first time on August 24, 2000, Mr. Zedeck sent Mr. Boseman a copy of the roster of artists represented by Evolution, his present agency, and stated, "I look forward to hearing from you." Mr. Boseman never responded. (*Id.* ¶ 15(d), Ex. B.)

Furthermore, Mr. Zedeck states that he had not spoken to Plaintiffs Rowe, Boseman or King prior to November 1998 and that in fact he had never heard of Mr. Rowe, Mr. Boseman or Mr. King. (*Id.* ¶ 13.) Additionally, Mr. Zedeck states he did not know that they were concert promoters and had no reason to believe that they were concert promoters who would be capable of promoting, or available to promote, concerts by the artists Renaissance represented. (*Id.* ¶¶ 13, 17.) Plaintiffs' response, which relies solely on Mr. Rowe's responsive affidavit stating that Plaintiffs dealt with Famous Entertainment

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took any discriminatory actions against them or were members of the conspiracy alleged in the Amended Complaint.

during the period Mr. Zedeck worked there (Rowe Renaissance Aff. ¶ 12), that "Renaissance knew exactly who the plaintiffs were" (Pls.' Resp. Renaissance Mem. at 6) is conclusory, not supported by evidence, and is an insufficient contradiction of Mr. Zedeck's statements. Lastly, Plaintiff King testified that he could not recall ever speaking to an agent at Renaissance to promote a white artist or a black artist, nor could he identify one artist Renaissance represented. (King Dep., in J.A., Vol. V, at 814-16, 828.)

Mr. Zedeck acknowledges that before this action was filed in November 1998, he was aware of Plaintiff Jones, but knew him not as a concert promoter but rather as an events producer in Memphis who produced corporate-sponsored events, like the Southern Heritage Classic and Memphis Blues Festival, which did not require Mr. Jones to put his own personal capital at risk. (Zedeck Decl. I ¶ 14.) Mr. Zedeck's recollection is that before this action was filed, Mr. Jones never made an offer to promote a concert by an artist Renaissance represented or even contacted him about such a possibility. (*Id.*)[218]

Mr. Zedeck acknowledges that in December 1998 Mr. Jones was involved with a concert of Deborah Cox, an artist represented by Renaissance at the time. However,

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[218] Plaintiffs maintain that Mr. Jones was known to Mr. Zedeck as a concert promoter because "Jones had previously promoted Renaissance's black artist, Solo." (Pls.' Resp. Renaissance at 6 (citing Pls.' Renaissance Ex. 28).) Plaintiffs' Renaissance Exhibit 28 (which is in Exhibit 29) contains copies of Summitt's contract, dated March 14, 1996, for services of Solo with Pyramid Entertainment during the 1996 Marlboro Military Tour. Pyramid Entertainment is not shown have been controlled or operated by Mr. Zedeck. Plaintiffs do not raise a genuine issue of material fact. The tour appears to be sponsored by Marlboro cigarettes, consistent with Mr. Zedeck's statement that he believed Mr. Jones was not an independent promoter but produced corporate events.

he states that Ms. Cox, who performed as an opening act, did so as a result of agreement between her manager and the Isley Brothers (artists), not negotiations conducted by Renaissance. (*Id.* ¶ 14 n. 1.)

Mr. Zedeck also acknowledges that, after the action was filed, Plaintiff Fred Jones did send a fax to Renaissance on January 13, 1999, reading as follows:

> We noticed in the January 11, 1999 issue of Pollstar that there was no mention of a concert schedule for N'Sync in Memphis.
>
> Whenever you decide to play Memphis we would like to make an offer.
>
> Let me hear from you.

(Zedeck Decl. I Ex. A.)

Mr. Zedeck responds that this inquiry is not a concert offer as it mentions no particular dates, venue, or price, and that at the time he could not make N'Sync available to play Memphis because N'Sync already was engaged in a tour based on a confirmed national tour agreement in place with a national tour promoter. (Zedeck Decl. I ¶ 15(b).) At oral argument, Plaintiffs did not seek to show that this offered business reason for not responding to Mr. Jones was a pretext. *McDonnell Douglas*, 411 U.S. at 804.

As for post-su.. contacts with Plaintiffs Rowe and Boseman, Mr. Zedeck acknowledges having two or three telephone conversations, in at least one of which both Mr. Rowe and Mr. Boseman participated, but he states, without dispute, that neither made an offer to promote any artist represented by Renaissance. (*Id.* ¶ 15(c).) Mr. Zedeck states that some, if not all, of the conversations occurred after 1999 when Renaissance was no longer was an operating business. Mr. Zedeck also states that

Mr. Rowe and Mr. Boseman expressed an interest in promoting concerts of only three particularly prominent artists, Britney Spears, N'Sync and The Backstreet Boys, but never proposed any particular date, venue, or price. (*Id.*) Mr. Zedeck states that he accurately told Mr. Rowe and Mr. Boseman that these artists were not available for concert promotions as the national tour agreements were already in place. (*Id.*) Mr. Rowe and Mr. Boseman have not provided any evidence from which it can be inferred that Mr. Zedeck's answer was a pretext. *McDonnell Douglas*, 411 U.S. at 804.

Because Renaissance's statement that it was not aware of any of Plaintiffs' availability as concert promoters prior to this action is unrebutted by Plaintiffs, and because N'Sync, the Backstreet Boys and Britney Spears were unavailable to do national tours, Mr. Boseman's and Mr. Rowe's failure to seek out concerts for Renaissance's lesser artists and failure to submit bids creates the inference that Plaintiffs were not making a serious effort to promote concerts by artists represented by Renaissance.

Plaintiffs state that they "have identified numerous [Renaissance] contracts that were denied Plaintiffs that were instead awarded to dominant white promoters." (Pls.' Resp. Renaissance Mem. at 10.) However, the Plaintiffs have not shown that they bid on any of these contracts or that Renaissance took any action to prevent them from bidding on the contracts. Plaintiffs' further argument that they did not make bids on concerts because their experience has been that making offers would have been futile (*id.*) is not applicable to Renaissance. Plaintiffs argue that "where, as here, there is a proven history of systemic discrimination by the defendant" bids for the concerts would be futile. (*Id.* at 10 (citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S.

324, 367-68 (1977)).) However, Plaintiffs' allegation of a proven history of systemic discrimination overlooks the fact that Renaissance only commenced its operations as an artist's agency in 1997, approximately one year before this action was commenced, and thus, had no promotion history of systemic discrimination. Nor can Plaintiffs rely on language in *PAS Communications, Inc. v. Sprint Corp.*, 139 F.Supp.2d 1149 (D. Kan. 2001) because Plaintiffs have not shown that Renaissance "deliberately kept Plaintiffs from learning about bid opportunities (by keeping Plaintiffs' names off bid lists) on the basis of race." *PAS* at 1176 n. 34. Renaissance has not been shown to have had bid lists, nor has it been shown to have notified more than several large promoters in a territory of an upcoming tour. Many white promoters in these territories, as well as black promoters, did not receive notice of the artist's planned concerts, not just the four Plaintiffs. Furthermore, Mr. Zedeck swears that he generally did not know the race of many of the promoters he did business with since he conducted negotiations by fax and over the telephone. (Zedeck Decl. I ¶ 11.) Under these facts, Plaintiffs have not presented a prima facie case of discrimination against them by Renaissance because of their race.

(b) General Claims of Conspiracy Participation

Plaintiffs have offered no evidence as to when the conspiracy started, who the members of the conspiracy were, how Renaissance joined the conspiracy, and how Renaissance was aware of the conspiracy's objectives as required for liability under § 1986.

As with the other Booking Agency Defendants, Plaintiffs state that "Renaissance has not produced a single contract demonstrating that a black promoter has ever

promoted a white artist whom it represented. Not one." (Pls. Resp. Renaissance Mem. at 1.) To support this claim, Plaintiffs do not cite the discovery record but rather paragraph 11 of the Mr. Rowe's affidavit submitted as an exhibit to Plaintiffs' Response to Renaissance's Motion for Summary Judgment. (*Id.* (citing Affidavit of Leonard Rowe, dated Apr. 21, 2003 ("Rowe Renaissance Aff."), attached as Ex. 1 to Pls.' Resp. Renaissance, ¶ 11).) Whether Rowe conducted a systematic and knowing search of the thousands of contracts produced by Renaissance is problematic.[219] Furthermore, this representation by Mr. Rowe contradicts the testimony of Al Haymon, a prominent black promoter, that he promoted Dream, a white artist represented by Renaissance. (Haymon Dep., in J.A., Vol. IV, at 263.)

With respect to the Plaintiffs' first general claim that Renaissance contacted "*only* an elite fraternity of *dominant* white promoters to promote its artists," (Pls. Resp. Renaissance Mem. at 1 (emphasis added)), the record

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[219] Mr. Rowe also concludes that Renaissance does not require the Promoter Defendants to submit bids and bases this conclusion on his review of the thousands of documents Renaissance submitted to Plaintiffs. (Rowe Renaissance Aff., Pls.' Renaissance Ex. 1, ¶9.) Mr. Rowe made a similar statement in other affidavits and declarations. The other Defendants have proved the falsity of this claim by producing contracts. Defendant WMA has produced evidence of bids as well as contracts from its computerized files to Plaintiffs. Beaver also produced bids at the hearing. (Court Ex. A) The record shows that Plaintiffs' former counsel (along with other attorneys and paralegals), Mr. Rowe, and Mr. King examined the files. (*See* Decl. of Laura L. Mall, Esq., dated Apr. 22, 2003, attached as Ex. 7 to Pls.' Resp. Mem. in Opp'n to Defs.' Mot. to Exclude Pls.' Expert Witness Dr. Gerald D. Jaynes's Affidavit, dated Apr. 24, 2003, ¶¶9-10.) There is no showing Mr. Rowe examined all files. This statement that Defendant Promoters are not required to submit written bids is conclusory. Also, the race of a promoter does not appear on the contract.

does not support Plaintiffs' claim. Mr. Zedeck, the sole principal and owner of Renaissance, did not testify that he had sought out white promoters, but rather testified that he had located promoters by calling the promoter suggested by the artist's manager, or by calling a radio station and asking them for a promoter. (Zedeck Dep., Pls.' Renaissance Ex. 25, at 46, 68.) He also stated that he located promoters by calling someone with whom he had a pre-existing relationship (*id.* at 76), or calling the building or radio station or record promotion representative in the specific market (*id.* at 78).

Mr. Zedeck testified that he contacted "dominant promoter" Don Law in Boston, but also that he contacted non-defendant concert promoter Mass Concerts in Boston. (*Id.* at 116.) He also stated that in Chicago he contacted three promoters, non-defendants The Entertainment Group and Scott Gelman, as well as Jam. (*Id.* at 90 .) He testified, "I don't have a guy anywhere." (*Id.* at 88.) Furthermore, a number of the promoters used by Renaissance are not among Plaintiffs' alleged dominant promoters. Plaintiffs' Renaissance Exhibit 34 shows contracts on Renaissance contract forms between artists and non-dominant promoters GSAC Partners, Beach Concerts, Inc., and Metropolitan Entertainment. Additionally, Exhibit 1 of Zedeck's Declaration II contains Renaissance contracts of artist Deborah Cox with promoters Junior Vasquez, C & J Promotions, Manny Lehman, FUSION, Jason McCarthy, Richard Grant, David Delissa, and David Marvisi, among others, none of whom are allegedly dominant promoters.

Accordingly, Mr. Zedeck's testimony and the exhibits produced are not supportive of Plaintiffs' claim of a conspiracy between Renaissance and the Promoter Defendants "by contacting only an elite fraternity of dominant white promoters to promote its artists." Plaintiffs rely on

no other testimony but rely on declarations that are conclusory and not based on personal knowledge. These conclusory statements are not admissible as evidence under Rule 56(b) of the Federal Rules of Civil Procedure.

Plaintiffs also cite, as support for the above claim, correspondence sent by Renaissance in early May 1997 and October 1997 to specific promoters regarding promotion opportunities for white artists and the lack of such correspondence with Plaintiffs. (Pls.' Resp. Renaissance Mem. at 4 (citing Pls.' Renaissance Ex. 15 (which should read Ex. 16)).) However, Mr. Zedeck explained he had sent these five or six faxes because the addressees were not familiar with him or The Backstreet Boys, and this was his method for stimulating offers for The Backstreet Boys. (Zedeck Dep., Pls.' Resp. Renaissance Ex. 25, at 82, 88.) The content of the letters in Exhibit 16 are consistent with Mr. Zedeck's explanation. These letters only function as an attempt to interest the recipients in the promotion of The Backstreet Boys. Plaintiffs do not provide any evidence to dispute this legitimate business reason for Mr. Zedeck's action.

The Plaintiffs' second argument that the evidence shows that Renaissance required less onerous contractual obligations from white promoters than black promoters (Pls.' Resp. Renaissance Mem. at 1) is unsupported by the evidence. Plaintiffs ask the Court to compare Plaintiff Jones's contract with artist Deborah Cox, requiring a 50% deposit on the guarantee (Pls.' Renaissance Ex. 30), with Ms. Cox's contract with white concert promoter Nederlander Anaheim Inc., in which no deposit was required (Pls.' Renaissance Ex. 33). (Pls.' Resp. Renaissance Mem. at 2-3, 7-8.) Based on these two documents, Plaintiffs assert that "[e]ven when a Plaintiff managed to promote a lesser black artist represented by

Renaissance, Plaintiff was treated differently than its white counterparts" and that "Renaissance . . . . required less onerous contractual obligations from white promoters who promoted Ms. Cox during the same time frame." (*Id.* at 7.)

These arguments by Plaintiffs' counsel are highly misleading. As Zedeck's Declaration II shows, Plaintiffs chose not to disclose to the Court that Renaissance had produced thirty-two contracts, not two contracts, for concert performances by Deborah Cox. (Zedeck Decl. II ¶ 3, Ex. 1). Of those contracts, twenty-nine promoters (almost all of whom were white) required deposits of 50% just like Plaintiff Jones. (*Id.* ¶ 4, Ex. 1.) Moreover, Mr. Jones admitted at deposition that Renaissance did not set the terms of his contract with Ms. Cox, but rather that he negotiated those terms directly with Ms. Cox's tour manager and that Renaissance merely issued the paperwork confirming the deal. (Jones Dep., J.A. Vol. IV, at 1046-47.)

Furthermore, Mr. Zedeck points out that two of the remaining three Cox contracts involved concerts at venues, the South Florida Fair and Six Flags Astroworld, which generally will not agree to pay deposits. (Zedeck Decl. II ¶ 4; *see also* Fax from Nancy Vance of WMA to Billie Bullock, manger for the Temptations, dated May 31, 1995 (stating "Nederlander does not pay deposits (never has, never will)"), Pls. WMA Ex. 114; Letter from Guy Richard of WMA to Dave Kaplan, manager of Brian Setzer Orchestra, dated July 3, 1996, Pls.' Resp. WMA Ex. 52 (stating that, as a matter of policy, Cellar Door will not pay a deposit for concerts performed at The Bayou).) The third contract, which was with Nederlander Anaheim Inc., involved a special situation in which Nederlander Anaheim agreed to pick up Deborah Cox as a guest star in its theater in Anaheim when her

concert tour with another promoter was cancelled.[220] Nederlander agreed to pick up responsibility for the concert expense if Ms. Cox agreed to be paid $15,000 in cash[221] on the concert date, i.e., without receiving any deposit. (Zedeck Decl. II ¶ 5; Pls.' Renaissance Ex. 33.) Plaintiffs have not offered any evidence to show that this business reason for the terms of the Nederlander Theatre contract is a pretext or sham. *McDonnell Douglas*, 411 U.S. at 804.

Plaintiffs submit two additional composite exhibits (Plaintiffs' Renaissance Exs. 34, 35), which purport to contain contracts showing that the "dominant" white promoters were offered contracts containing 10% or no deposits, not the standard deposit of 50% of the artist's guarantee. (Pls.' Resp. Renaissance at 7, 15.) Plaintiffs maintain that this disparity in contract terms is evidence from which an inference of discrimination against them can be drawn. However, Plaintiffs have not offered any evidence that they bid for any of these contracts. No inference of discrimination can be drawn from the departure from the standard deposit of 50%. These more favorable terms would impact competing white promoters as much as any black promoter. Furthermore, Plaintiffs' Renaissance Exhibits 34 and 35, which contain many duplicates, actually show only 114 contracts culled from the thousands of contracts Renaissance has produced to Plaintiffs.[222] These better terms received by

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[220] The contract is dated June 2, 1999 for a concert on June 6, 1999. (Pls.' Renaissance Ex. 33.)

[221] Mr. Jones agreed to pay Ms. Cox only $8,000 per concert. (*Id.* Ex. 31.)

[222] As shown by Mr. Zedeck's declaration, 138 of the 252 contracts contained in Exhibits 34 and 35 are duplicates, leaving only 114 contracts in all. (Zedeck Decl. II ¶ 7.) Of the 114, twenty were for

the "dominant white promoter" can be attributed to their better bargaining position, e.g., control of desirable venue (*see* Am. Compl. ¶ 82), recognized financial strength, or relationship with the artist. Many of the contracts submitted by Plaintiffs reveal that the concert promoters rejected the terms Renaissance or the artist's management proposed and negotiated lesser terms, which the artist's manager then accepted. Mr. Zedeck states that managers accepted these terms based on many years of relationship with the promoter, or the promoter's history, reputation or apparent financial wherewithal. (Zedeck Decl. II ¶ 12.) Other such contracts are for small venues with small guarantees or venues for which 50% deposits would be understandably waived. (*Id.* ¶ 11.) At oral argument, Plaintiffs did not seek to offer rebuttal of Mr. Zedeck's statements.

Plaintiffs' third argument that Renaissance "persuad[es] its artists that they should use the dominant white concert promoters" (Pls.' Resp. Renaissance Mem. at 1), a totally conclusory statement, is unsupported by any evidence from an artist, artist's manager, or admission of Renaissance. Plaintiffs, without offering any evidentiary support, state that "Renaissance and the other agency Defendants contact only the dominant white promoters on behalf of its white artists and do not contact multiple promoters to solicit competing bids to secure the best possible price for its artists." (Pls.' Resp. Renaissance at 1 (citing R. Johnson Aff., Pls.' Renaissance Ex. 7, ¶ 3).) Plaintiffs' citation to the affidavit of Richard Johnson, who last worked in the concert promotion field in 1986 for WMA, (R. Johnson Aff. ¶ 9)

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concert dates covered by tour deposits of 50% of the minimum artist guarantees in a tour agreements with Metropolitan Entertainment and with SFX Entertainment, who paid tour deposits of $450,000 and $1,156,000 respectively. (Zedeck Decl. II ¶¶ 8, 9, Exs. 3, 4)

does not support their claim. Renaissance was formed in 1996 and owned by Mr. Zedeck, who had previously been engaged in concert promotion almost entirely outside the United States for non-defendant Famous Artists Agency. (Zedeck Decl. I ¶¶ 2-4.) There is no showing by Plaintiffs that Richard Johnson had any experience with Renaissance or that Mr. Johnson knew or was aware of Mr. Zedeck while Mr. Johnson was employed by WMA. Thus, Plaintiffs' citation to this evidence is misleading.

As to Plaintiffs' claim that Renaissance was involved in an alleged conspiracy to deprive Fred Jones of an exclusive agreement for Mud Island and to install Beaver in Memphis as a dominant promoter to the further exclusion of Plaintiff Jones, Plaintiffs' provide no evidence of Renaissance's involvement in this alleged incident or any evidence from which an inference of involvement could be inferred. Mr. Zedeck testified that he had no knowledge of Mr. Jones's application for, or denial of, an exclusive agreement regarding Mud Island. (Zedeck Decl. II ¶ 16.) Mr. Zedeck also denies any communication with Beaver about Mr. Jones or Mud Island. (Zedeck Decl. I ¶ 18.)[223] Plaintiffs have presented no contradicting evidence. Furthermore, in Mr. Jones's deposition he admitted that he did not send a letter announcing his "exclusive agreement" for Mud Island to Renaissance, although he sent the letter to other booking agencies. (Jones Dep. at, in J. Reply A., 1062-66.) Plaintiffs cite Renaissance's contracts with Beaver in Memphis as evidence that it was complicit in the conspiracy. (Pls.' Resp. Renaissance Mem. at 14 (citing Pls.' Renais-

[223] Mr. Zedeck also points out that Renaissance could not have conspired to bar Plaintiff Rowe from obtaining an exclusive promotion arrangement at the Chastain Amphitheater in the early 1980s (Am.Compl.¶ 87(p)) since Renaissance did not exist at that time. (Zedeck Decl. I ¶ 19.)

sance Exs. 39, 40, 41).) These four contracts merely show that Renaissance and Beaver contracted for promotion of four concerts and do not raise an inference of conspiracy or discrimination based on race in these circumstances.

Mr. Zedeck states that "Renaissance never made an agreement with anyone—not another booking agency, not any concert promoter, not anyone else—to exclude anyone from the concert promotion industry, let alone on the basis of race. Nor did Renaissance ever even discuss making any such agreement with anyone." (Zedeck Decl. I ¶ 6.) Plaintiffs have offered no evidence that would form the basis for an inference to the contrary. Mr. Zedeck further points out that "Renaissance and its clients benefited from vibrant and vital competition between and among concert promoters. Such competition was critical to Renaissance and its artists' ability to obtain the best possible prices for the artists' performances. Further, participating in the conspiracy alleged in the complaint would have driven Renaissance's top artists to other competing booking agencies." (Zedeck Decl. I ¶ 7.)

Plaintiffs have presented no evidence that Renaissance discriminated against or participated in a conspiracy to discriminate against or knew of any alleged conspiracy to discriminate against Plaintiffs in violation of §§ 1981, 1985(3) or 1986. Therefore, summary judgment is granted on these claims.

V. CONCLUSION

The Court concludes, after weighing all the evidence in this case and drawing all inferences in favor of the Plaintiffs, that Plaintiffs have raised no genuine issue of material fact and that no rational trier of fact could find

for Plaintifffs on any of the myriad of claims made in this action. Accordingly, Defendants' motions for summary judgment are granted. Defendants shall enter judgments for five days notice.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 05-0854-cv

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United Stated Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 30th day of December, two thousand and five.

Present: JOSEPH M. MCLAUGHLIN,
ROSEMARY S. POOLER,
BARRINGTON D. PARKER,
Circuit Judges.

ROWE ENTERTAINMENT, INC., LEONARD ROWE, SUN SONG PRODUCTIONS, INC., JESSE BOSEMAN, SUMMITT MANAGEMENT CORPORATION, FRED JONES JR., LEE KING PRODUCTIONS, INC., and LEE KING,

Plaintiffs-Appellants,

—v.—

THE WILLIAM MORRIS AGENCY, INC., CREATIVE ARTISTS AGENCY, L.L.C., RENAISSANCE ENTERTAINMENT, INC., JAM PRODUCTIONS, LTD., and BEAVER PRODUCTIONS, INC.,

Defendants-Appellees.

Appearing for Plaintiffs-Appellants: Keila Ravelo, Wesley Powell, Valeria Calafiore, and Myriam Gilles, New York, NY.

Appearing for Defendant-Appellee Jam Productions, Ltd: James Roberts, Chicago, IL, and Monica McCabe, New York, NY

Appearing for Defendant-Appellee Beaver Productions, Inc.: Matthew F. Popp, New Orleans, LA

Appearing for Defendants-Appellees booking agencies: Michael P. Zweig and Helen Gavaris, New York, NY (The William Morris Agency, Inc.); Jeffrey Klein, Gregory Coleman, and Andrea Berner, New York, NY (Creative Artists Agency, LLC); Steven Hayes and Gregory Clarick, New York, NY (Renaissance Entertain-

ment, Inc.); and Jeffrey Kessler, New York, NY (Creative Artists Agency, LLC)

Appeal from the United States District Court for Southern District of New York, (Robert Patterson, District Judge).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Plaintiffs-appellants ("appellants") originally brought this action on November 19, 1998, in the United States District Court for the Southern District of New York. (Patterson, J.) Defendants-appellees ("defendants") successfully moved to dismiss the complaint in its entirety pursuant to Fed. R. Civ. P. 12(b)(6). *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98 CIV. 8272 (RPP), 1999 WL 335139 (S.D.N.Y. May 26, 1999). All dismissals were with leave to amend. Appellants then filed a single amended complaint, dated August 9, 1999, in the United States District Court for the Southern District of New York (Patterson, J.). Remaining as defendants were two concert promoters and three booking agencies. Appellants survived defendants' second Rule 12(b)(6) motion to dismiss. *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98 Civ. 8272, 2000 WL 896929 (S.D.N.Y. July 6, 2000). After the completion of three years of discovery, defendants brought five individual motions for summary judgment, and one joint motion by the booking agency defendants. The district court granted every motion for summary judgment. *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98 Civ. 8272, 2005 WL 22833 (S.D.N.Y. Jan. 5, 2005).

We assume the parties' familiarity with the facts, procedural history, and specification of issues on appeal. The district court below wrote a very thorough and useful opinion, which carefully searched the record, discussed the pertinent facts, and examined the appellants' claims.

This Court reviews de novo the granting of summary judgment by a district court. *Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 104 (2d Cir. 2002). Summary judgment is appropriate only where, "examining the evidence in the light most favorable to the nonmoving party," *Adjustrite Sys., Inc. v. GAB Bus. Servs., Inc.*, 145 F.3d 543, 547 (2d Cir. 1998), the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c). A motion for summary judgment must be rejected "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Apellants do not address or raise several issues and claims set forth in their amended complaint. An argument or an issue that is not raised in the appellate brief may be considered abandoned. *LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995).

Section 1981 provides, in pertinent part, that all persons "shall have the same right . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981(a). In order to succeed under § 1981, a plaintiff must present evidence to "show both that he was subjected to intentional discrimination, and that this discrimination interfered with a contractual relationship." *Krulik v. Board of Educ.*, 781 F.2d 15, 23 (2d Cir. 1986) (citations omitted); see also *Runyon v. McCrary*, 427 U.S. 160, 170-71

(1976) ("[A § 1981] right to 'make and enforce contracts' is violated if a private offeror refuses to extend [on account of race] the same opportunity to enter into contracts as he extends to white offerees."). Discrimination claims under § 1981 are governed by the three-part test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). See *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987). As to the § 1981 claims against all defendants, appellants have put forth no facts on which a reasonable juror could conclude that racial discrimination interfered with a contractual relationship.

Section 1985(3) makes illegal, in relevant part, conspiracies undertaken "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws" and provides for "an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators." 42 U.S.C. § 1985(3). In *Thomas v. Roach*, 165 F.3d 137 (2d Cir. 1999), this Court held that "a plaintiff alleging a conspiracy under § 1985(3) must allege, with at least some degree of particularity, overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy." Id. at 147. As the district court found, there is no evidence that any alleged conspiracy was racially motivated. Appellants have put forth no evidence from which any reasonable juror could infer the existence of a conspiracy.

Section 1 of the Sherman Act makes illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. While most antitrust claims are analyzed under the

rule of reason, some types of restraints "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (citing *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958)). "Conduct considered illegal *per* se is invoked . . . where a defendant's actions are so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are conclusively presumed illegal without further examination . . . . Most cases fall outside these narrow, carefully demarcated categories held to be illegal *per* se. In the general run of cases a plaintiff must prove an antitrust injury under the rule of reason." *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 542-43 (2d Cir. 1993) (citation and internal quotations marks omitted).

Here, the district court properly applied the rule of reason analysis. Had the district court applied the *per* se analysis, however, the summary judgment motion would have been granted. There is no evidence in the record from which any reasonable juror could infer that any agreement existed.

Accordingly, for the reasons set forth above, the judgment of the District Court is hereby **AFFIRMED.**

FOR THE COURT:
Roseann B. MacKechnie, Clerk of Court

By:

_____

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed May 2, 2006

Date:	4/28/06
Docket Number:	05-0854-cv
Short Title:	Rowe Entertainment v. The William Morris
DC Docket Number:	98-cv-8272
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable Robert Patterson

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 2nd day of May two thousand six.

Rowe Entertainment, Inc., Leonard Rowe, Sun Song Productions, Inc., Jesse Boseman, Summitt Management Corporation, Fred Jones Jr., Lee King Productions, Inc. and Lee King,

Plaintiffs-Appellants,

v.

The William Morris Agency, Inc., Creative Artists Agency, L.L.C., Renaissance Entertainment, Inc., Jam Productions, Ltd. and Beaver Productions, Inc.,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en bane having been filed herein by the Appellant Rowe Entertainment, Inc. et al. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: /s/ ARTHUR HELLER
Motion Staff Attorney

42 U.S.C.A. § 1981

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs Rowe Entertainment, Inc., Sun Song Productions, Inc., Summitt Management Corporation, and Lee King Productions, Inc. make the following Corporate Disclosure Statement:

(1) Rowe Entertainment, Inc. has no parent corporations, it does not issue stock and therefore no publicly-held company owns 10% or more of the stock of Rowe Entertainment, Inc.;

(2) Sun Song Productions, Inc. has no parent corporations, it does not issue stock and therefore no publicly-held company owns 10% or more of the stock of Sun Song Productions, Inc.;

(3) Summitt Management Corporation has no parent corporations, it does not issue stock and therefore no publicly held company owns 10% or more of the stock of Summitt Entertainment Corporation; and

(4) Lee King Productions, Inc. has no parent corporations, it does not issue stock and therefore no publicly held company owns 10% or more of the stock of Lee King Productions, Inc.

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JURISDICTIONAL STATEMENT

A. Jurisdiction of the District Court was invoked based upon federal questions, pursuant to 15 U.S.C. § 1, and the Civil Rights Act of 1866 and 1991, 42 U.S.C. §§ 1981, 1985(3) and 1986.

B. The basis for jurisdiction in the present appeal is 28 U.S.C. § 1294. This appeal is from a District Court of the United States to the Court of Appeals for the Circuit embracing the district.

C. As to the Judgments appealed from in this case that were entered in the Office of the Clerk of the District Court of the Southern District of New York on January 3, 2005 (Jam Production, Ltd.), February 3, 2005 (William Morris Agency, Inc.), February 3, 2005 (Renaissance Entertainment, Inc.), February 3, 2005 (Creative Artists Agency, LLC) and February 10, 2005 (Beaver Productions, Inc.), Plaintiffs served and filed the Notice of Appeal on February 16, 2005. A revised scheduling order set the last day to appeal as May 27, 2005. Accordingly, the present appeal has been timely instituted and perfected.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the record contains sufficient evidence to raise triable issues of fact that Plaintiffs suffered discrimination on the basis of race in their right to make and enforce contracts protected under 42 U.S.C. §§ 1981 and 1985(3) of the Civil Rights Act of 1866.

2. Whether the record contains sufficient evidence to raise a triable issue of fact that Defendants violated Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, by conspiring to allocate territories in order to minimize competition.

STATEMENT OF THE CASE

Plaintiffs instituted this action in the District Court based on claims of racial discrimination in their rights to make and enforce contracts and an unlawful antitrust conspiracy.

These facts and circumstances formed the basis of the complaint filed by the Plaintiffs against the Defendants in the United States District Court, Southern District of New York. After the completion of discovery, Defendants brought five motions for summary judgment on behalf of each individual Defendant, and one joint motion for summary judgment brought by Defendants William Morris Agency, Inc. ("WMA"), Creative Artists Agency, LLC ("CAA") and Renaissance Entertainment, Inc. ("Renaissance") (collectively, the "Booking Agency Defendants"). The District Court (Hon. Robert J. Patterson), after "weighing all of the evidence," (SPA-173) (emphasis added), granted Defendants' motions in their entirety and dismissed the Plaintiffs' complaint. It is from this decision that this appeal follows.

PRELIMINARY STATEMENT

This action challenges race-based discriminatory practices that have permeated the modern concert promotion industry in the United States since its inception. To this day, the Defendant Booking Agencies WMA, CAA, and Renaissance solicit bids to promote popular music concerts only from a "good old boys' network" (in the words of one white promoter) or a "fraternity" (in the words of another) comprised of white-owned concert promotion firms. The Plaintiffs—all black-owned promotion firms and their owners—have repeatedly sought to compete for the opportunity to promote the superstar white and black acts represented by the Booking Agency Defendants. These Defendants, however, not only have failed to solicit or entertain the Plaintiffs' bids, but they have repeatedly misled Plaintiffs concerning promotion opportunities in an effort to keep them from bidding, rejected Plaintiffs' high bids in favor of lower bids from white promoters, and routinely imposed conditions on black promoters that they do not impose upon their white competitors.

Among other things, the evidence shows that the favored white promotion firms are *routinely* offered promotions on which they are required to post deposits between 0 and 10% of the artist guarantee, and that black promoters are *always* required to post a 50% deposit. Such disparate material terms and conditions predictably impede minority bidding and, standing alone, support submission of Plaintiffs' § 1981 case to a jury.

Further supporting the inference of discrimination are the Booking Agency Defendants' repeated misrepresentations regarding the disparate deposits and guarantees required to promote their clients' acts. For example,

when Plaintiff Rowe sought to bid $300,000 in per concert artist guarantees for the right to promote the 1998 Janet Jackson tour, Defendant CAA falsely told him that he would have had to post the total guarantee before tickets went on sale (50% in cash, and the remainder in an irrevocable letter of credit) within days. In reality, the agency had cut a deal with one of its favored white promoters for lower artist guarantees and a sweetheart deposit deal. Lest the discriminatory impetus behind these particular actions escape future observers, one CAA executive made the handwritten notation "[Do] Not Divulge Guarantee re Black Promoters." Another such note praised the work of CAA executive Rob Light, whose deception of Plaintiff Rowe in connection with the Janet Jackson tour allowed the agency to avoid having to explain the rejection of a higher bid from a black promoter, at a time when black promoters had begun to criticize Defendants' practices: "Black Promoter Issue—Rob Light kept this situation under control."

In the end, there is no shortage of evidence suggesting that the failure of the Booking Agency Defendants to solicit or entertain bids from any of the Plaintiffs is animated by discrimination. In their defense, the Booking Agency Defendants invoke a plethora of patent pretexts, including historical and financial information allegedly bearing on the Plaintiffs' qualifications. All of this "evidence," however, was only acquired during discovery in this action (so they could not have relied on it in rejecting Plaintiffs' bids), and is demonstrably immaterial in any event.

The Defendants also point to several "successful" black promoters as evidence that their actions are not fueled by discrimination. But none of these black-owned promoters have been afforded the preferred deposit and payment terms that are routinely extended to white pro-

moters. In any event, the blatant tokenism of Defendants' examples betrays their arguments. WMA claims, for example, that it tapped black-owned Magic Johnson Productions ("MJP") (owned by the former basketball star, who is a WMA client) as the "national promoter" for a national tour by the black artist Maxwell in 1998. The evidence shows, however, that WMA first inserted white-owned promoter firms from its "good old boys' network" to run each stop of the tour, and then inserted MJP. There are no other examples—none—of a "national promoter" lacking the power to choose its local co-promoters. In essence, MJP was paid to lend its name and help silence critics of the Booking Agency Defendants' discriminatory practices.

This action also seeks redress for the actions of Promoter Defendants Beaver and Jam. The evidence contains, for example, direct evidence that Beaver and the Booking Agency Defendants conspired to induce the City of Memphis to drop its plans to enter an exclusive relationship with Plaintiff Jones, lest his black-owned promotion firm assume responsibility for promoting a steady stream of white acts at a City-owned venue. Finally, this action challenges the conspiracy among all Defendants to divide and allocate markets in a fashion that is inconsistent with the federal antitrust laws, just as it violates the civil rights laws.

STATEMENT OF FACTS

A. The Parties

1. The Plaintiffs

Rowe and Rowe Entertainment: Plaintiff Leonard Rowe, shareholder and president of Plaintiff Rowe Entertainment, is an African American concert promoter,

and has been engaged in that business for more than 26 years. (SPA-5.) Rowe is an experienced concert promoter, having promoted and co-promoted concerts throughout the country, including national tours. (A-8876; SPA-2454.) Among other relevant experience, Rowe was the lead promoter for the national tour of the *Sugar Daddy* musical series, which consisted of 122 shows in major cities across the United States, and in which all of the other Plaintiffs participated as promoters as well. (*Id.*) Rowe has also promoted The Jacksons on a national tour, working with Michael Jackson and his family for over three months. (A-8876.) According to Marlon Jackson, Rowe did an outstanding job promoting that tour with a high degree of professionalism. Having worked with hundreds of promoters, Leonard Rowe was one of the best. I can say without reservation that our concert tours that were promoted by Leonard Rowe were very well done." (A-18354-55.) Among other major acts, Rowe has served as promoter for the Temptations, Diana Ross, War, Aretha Franklin, The Spinners, and Al Green. (A-17608.36.)

Boseman and Sun Song Productions: Plaintiff Jesse Boseman, shareholder and chief executive of Plaintiff Sun Song Productions, Inc., is also an African American concert promoter and has been engaged in that business for approximately 25 years. (SPA-5.) Sun Song has two full time employees and also uses several independent contractors to carry out its concert promotion business, which has included promoting concerts in New York, including venues such as Madison Square Garden, and elsewhere along the East Coast of the United States. (A-17608.46-50.) Boseman has served as sole promoter for concerts involving Luther Vandross, Patti La Belle and other prominent artists, and has co-promoted concerts

for Rick James, Teddy Pendergrass, and Prince. (A-17608.50.)

Jones and Summitt: Plaintiff Fred Jones, shareholder and president of Plaintiff Summitt Management Corporation ("Summitt"), also is an African American concert promoter and has been a concert promoter for over 30 years. (SPA-2.) As Dr. Herenton, the Mayor of the City of Memphis, testified, Mr. Jones' "track record in the field of promotion has been outstanding." (A-772.) Even the Defendants have acknowledged that Jones has been a successful promoter "for many years." (A-9011-12; *see also* A-766 (Jones is a "well-respected concert promoter").)

King and King Productions: Plaintiff Lee King, shareholder and chief executive of Plaintiff Lee King Productions, is an African American and has been engaged in the concert promotion business for approximately 30 years. (SPA-5.) Mr. King formed Lee King Productions in 1978, (SPA-5), and is capable of promoting concerts at small and large venues anywhere in the country. (A-8924.) Mr. King carries out his concert promotion business by working with a number of independent contractors. (A-17608.42.) Among other acts, Mr. King was lead promoter of the Gap Band in 1983-84. (A-17608.43), and has promoted many other concerts in the Southeast. (A-8915.) Throughout his career, Mr. King has promoted artists such as James Brown, Chaka Kahn, Earth Wind and Fire, the Commodores, Lionel Richie, the Jacksons, Patti LaBelle, Janet Jackson, Teddy Pendergrass, and Puff Daddy to name a few. (A-5330.)

2. The Booking Agency Defendants

Plaintiffs initially asserted claims against eight booking agencies. (SPA-2.) Of these eight firms, five entered into confidential settlements of all claims and were sub-

sequently dismissed from the action. (*Id.*) The remaining Booking Agency Defendants are WMA, CAA, and Renaissance.

The William Morris Agency ("WMA"): Defendant WMA is a privately held company, founded in 1898, which represents clients in various entertainment fields, including music, television, books, theatre and movies. (SPA-1-7.) WMA's music division has approximately sixty agents and represents over 500 artists. (SPA-7). None of WMA's booking agents are black.

Creative Artists Agency ("CAA"): Defendant CAA is a limited liability company, incorporated in Delaware in 1995, with its principal place of business in California. (SPA-7-8.) CAA represents musical artists in the booking of live musical performances. (SPA-8.) CAA currently employees approximately twenty-eight music agents and represents over 200 musical artists. (SPA-8). Of its twenty-eight agents, CAA currently has one black agent, in its Music Department, who was hired in May 1999, after this lawsuit was filed. (A-4950; A-4957; A-5250.) That agent, Dennis Ashley primarily works with the placement of musical tours by black artists ("black acts") among concert promoters. (A-4960.)

Renaissance Entertainment ("Renaissance"): Defendant Renaissance was a booking agency company incorporated in New York in 1996. (SPA-8.) Its sole principal and shareholder was David Zedeck, who employed between three and six booking agents, and represented artists in approximately 90 music concerts around the United States. (*Id.*) On December 31, 1999, Renaissance ceased all business operations and sold its assets to Evolution Talent Agency, LLC, ("Evolution") which was started by David Zedeck and a partner. (SPA-8.) Evolution and Renaissance are substantially the same

company and Renaissance has continued defending the lawsuit in its original name. (SPA-8.)

3. The Promoter Defendants

Jam Productions Ltd. ("Jam"): Defendant Jam is an Illinois corporation with its principal place of business in Chicago, Illinois. (SPA-6.) Jam is owned and operated by Arny Granat and Jerry Mickelson who are both white. (SPA-6.) Jam is a music concert and shows promoter, having promoted an average of approximately 600-700 shows per year, and between 400-1200 events between 2001 and 2002. (SPA-6.)

Beaver Productions, Inc. ("Beaver"): Defendant Beaver is a Louisiana corporation formed in 1969 with its principal place of business in New Orleans, Louisiana. (A-2454.) Don Fox is the president and sole shareholder of Beaver, and Barry Leff is its vice-president; both are white. (A-2454; SPA-6.) Mr. Leff has worked for Beaver since 1975. (A-2453.) Beaver is engaged in the business of promoting music concerts. (A-629.) Beaver has promoted an average of 200 concerts per year throughout North America, but it focuses the majority of its concert promotion business in the Greater New Orleans area.[1] (SPA-6; A-630; A-809.)

B. Background of the Concert Promotion Business

Established musical artists seeking to arrange live concert performances in the United States generally engage "booking agents" to organize and retain production and promotional services for their live perfor-

[1] There were originally 26 promoters named as defendants in this case. Two were voluntarily dismissed. Of the rest, all but Jam and Beaver paid confidential sums prior to summary judgment in settlement of Plaintiffs' claims and were subsequently dismissed on consent.

mances. (SPA-9-10.) Typically, the artist or its manager will designate the number of concerts that the artist wishes to perform, along with the period of performance and the locales they seek to play. (SPA-11.) The booking agency then solicits specific concert promoters to produce the concert in the various geographic locations. (*See* SPA-11.) Promoters may produce an entire nationwide tour ("national tour promoters"), or simply one or more events on the tour. (*See* SPA-9; SPA-12-13.) Often, a promoter will engage a co-promoter to assist at the local level with publicizing and producing the event. (SPA-12.) A promoter who works with a co-promoter is referred to as the "lead promoter." (SPA-12.)

While the artist theoretically retains the ultimate authority over which promoters to hire, it is the booking agent, in reality, that makes this determination. As a prominent non-party booking agent testified, "[o]n a scale of 1-to-10, . . . the [influence of the agent's recommendation is] probably in the 7 range." (A-18617.) Bill Cosby also testified that 90% of promoters he considered hiring came through his booking agency, WMA (A-18679.1), and industry veteran Marlon Jackson likewise testified that the Jacksons' booking agency always was entrusted with the selection of the promoter. (A-18355-56.) In any event, whether or not the booking agents consult with the artists or their managers concerning the offers of particular promoters, it is the booking agents who determine from which promoters to solicit offers. According to the testimony of former WMA booking agent Richard Johnson, if "any unsolicited offer or bid came to an agent from a . . . promoter, it would likely never leave his or her desk." (A-8941.)

The booking agents select promoters based on nonobjective factors such as longstanding friendships and

business relations that stretch back many years; indeed, as defendants have asserted, the "concert promotion business is built on relationships—with artists, managers, promoters, agents, vendors and radio stations—that are developed and nurtured over time." (A-17608.3; SPA-10.) By the same token, "[v]ery often, promoters select co-promoters based exclusively on their relationships with other promoters." (A-17608.6) (emphasis added). Defendants' expert witnesses also stressed that these friendships or previous relationships are the principal consideration in selecting promoters.[2] (*See, e.g.*, A-2716.) As Alex Cooley, a non-party white promoter, aptly put it, the industry is quintessentially an all-white "good old boys' network." (A-5007-08.)

Former WMA agent Richard Johnson described some of the relevant industry dynamics in his affidavit:

> each major market in the United States is controlled essentially by one primary or dominant promoter, whose identity is well known among all the major booking agents . . . [w]hen a white artist represented by WMA wanted to have a concert in one or more cities, or stage a nationwide tour, there was no competitive 'bidding' process, in which WMA engaged in arms-length bargaining with several promoters in . . . order to get the best deal for themselves and their artists. Agents . . . instead were instructed to book their dates through the dominant promoter in his or her market.

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[2] Note, however, that Dr. Gonzales, the Defendants' expert witness who purportedly opined as to the factors that play a role in the selection of a promoter, never considered whether race played any role among the factors considered for the selection of a promoter or co-promoter, and admitted that beyond the factors he listed, others could also come into play. (A-5045-46.)

(A-8941.) Mr. Johnson further testified that these "relationships between the booking agents and the dominant promoter in each region were virtually unbreakable." (A-8941.) Not surprisingly then, Mr. Johnson was able to "recall no instance while he was employed at WMA in which a white artist was promoted by a black promoter." (A-8942.) Moreover, in the event "a black artist gained cross-over appeal and became a major star, those acts were no longer considered 'black' and were handed over to a white promoter." (A-8942.)

Although Mr. Johnson left WMA in 1986, commencing 10 years' service as a prosecutor in New York City, the record shows the basic industry dynamics he described have not changed in any meaningful way.[3] (A-15273-75.) The "good old boys' network" continues to deter African Americans from fully participating in the concert promotion business. (*See, e.g.*, A-5007-09). In fact, between 1994 and 2001, according to the Defendants' expert Dr. Jizmagian, black-owned promotional firms accounted for just "1.44 percent of the total number of available concert promoters." (A-2702; *see also* A-2741; A-2747 ("the true figure for African American concert promoter representation is closer to 1%")). The

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[3] The trial court erroneously rejected this former WMA employee's affidavit because unsolicited bids received by a WMA agent from any "secondary promoter" (white or black) "would likely never leave his or her desk." (SPA-129.) Thus, according to Judge Patterson, the statement does not support a claim of racial discrimination because both white and black promoters were impacted by this routine rejection of unsolicited bids. (*Id.*) Yet, this statement (read in the context of the balance of the affidavit) permits another plausible inference: because WMA solicited bids only from certain white promoters, the practice of rejecting unsolicited bids shut out black promoters, whose only channel to the business was unsolicited bidding. Judge Patterson impermissibly resolved these disputed inferences in Defendants' favor.

paucity of African Americans among co-promoters is no less striking. Defendant Beaver, for instance, has been operating as a promoter for over 30 years, promoting an average of 200 concerts per year throughout North America. (SPA-7; A-2453-54.) During this entire period, Beaver has almost never co-promoted with black promoters and even then only once for a white act, which was at the artist's manager's request. (SPA-103.) Defendant Jam has a similar track record. (SPA-59; *see also* A-649.)

The general presence of racial discrimination in the concert promotion industry is undeniable. As industry veteran Marlon Jackson testified, "racial discrimination is and [always] has been prevalent in the music business and in the concert touring business." (A-18355-56.) White agents and promoters have made the same observation: senior WMA booking agent Cara Lewis testified that racism is prevalent in the industry (A-2672), and veteran white promoter Bruce Kapp observed that racial discrimination is particularly acute when it comes to promotion of white acts by black promoters. (A-5119.)

C. The Contracting Process

Thomas Ross, former Director of CAA's music department, testified that "the general way an agent would go about booking a tour would be to call the promoters." (A-5247.) To be sure, promoters are often "proactive" in calling the booking agencies to inquire whether a particular act is going out on tour, or to express an interest in promoting a particular artist. (SPA-14.) Still, a promoter does not have an opportunity to place a bid to promote an artist unless and until he gets a call (or a call back) from the booking agent. Until the promoter learns of tour dates and venues, he lacks the wherewithal to submit an offer to promote.

Routinely, the Booking Agency Defendants give advance notice of upcoming tours and dates to the favored white promoters, such as the Promoter Defendants. (*See, e.g.*, A-8983; A-8986; A-8992-93; A-10913-17; 10919; 10920-10941; 10943-83.) To be fair, the Booking Agency Defendants "assert that they do not give advance notice to the Promoter Defendants of *every* tour of *every* white artist," (SPA-15) (emphasis added), and this may well be true. However, it is certainly true that the black promoter Plaintiffs have *never* received *any* advance notice of *any* white artist or, for that matter, of any superstar black acts.[4] (*See, e.g.*, A-8891; A-8906; A-8917; A-8899; A-5286; A-5318; A-5325; A-5331; *see also* A-4238 ("[CAA] didn't give any advance notice necessarily to black promoters").)

Once a promoter is solicited to bid on an upcoming act—or once he obtains information sufficient to bid—he negotiates the terms of the act with the booking agent. (SPA-11.) Among other things, the bid must include the artist's guarantee, which "is the amount of money that a promoter agrees to pay the artist for a particular performance." (SPA-16.) The minimum acceptable guarantee and deposit amount—*i.e.* the percentage of that guarantee that will be paid up front, as a deposit—and the timing of that deposit payment are communicated to the promoter by the booking agent. (*See* SPA-14-20.)

D. Disparate Contractual Terms

The trial court ignored the substantial record evidence that the Booking Agency Defendants routinely offered

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[4] After the onset of litigation, however, Plaintiff Rowe was notified in advance by CAA of the opportunity to promote shows for Stevie Wonder and Gloria Estefan—both "phantom" tour offers inasmuch as each tour was cancelled. (A-1411.)

Beaver, Jam and the other members of the "good old boys' network" contractual terms that, as a matter of course, they do not make available to black-owned promoters. Specifically, the Booking Agency Defendants routinely allow the favored white promoters to either post no deposit at all, or to deposit 10% of the amount of the artist guarantee when contracting for a promotion. In discovery, the Plaintiffs obtained more than 2650 contracts from the files of the defendants: at least 1855 from WMA; 753 from CAA; and 56 from Renaissance.

As even a cursory review of these documents reveals, the Promoter Defendants Beaver and Jam and the other dominant white promoters are given deposit terms of 0 to 10 % in virtually every contract—certainly well over 95% of them. In the overwhelming majority of agreements, the pre-printed form agreement calls on its face for a 50% deposit, and the handwritten terms provide "No Deposit" or, at most, 10%.[5] These agreements further disclose that the Booking Agency Defendants routinely allowed these promoters to make payment by ordinary company check and tolerated late payments to their artists. (*See, e.g.*, A-11249-15200 (exhibits containing contracts and checks demonstrating, in many instances, disparity between the date the deposit is due and the actual payment date, as well as differences in deposit amount due and paid).)

By sharp contrast, black promoters have at all times been required by the Booking Agency Defendants to

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[5] The fact that the pre-printed contract form recites "50% deposits" hardly means that the standard deal for the dominant white promoters was 50%. In well over than 95% of the contracts, these promoters received 0-10% deposit terms. Obviously, what has become standard off-the-rack deal for white promoters is a 0 to10 % deposit term handwritten in on top of a pre-printed form that recites 50%. (*Cf.* SPA-106.)

post a deposit totaling at least 50% of the artist guarantee. (*See* A-15169-70; A-15360-61; A-8899-8900; A-8918-19.) Not just the Plaintiffs, but other black promoters such as Al Haymon, were regularly subjected to this standard requirement as well. (*See* A-15136-38.) Moreover, the Plaintiffs black promoters were regularly required to post their significant deposits in cash, or by cashier's check, and to do so *before* tickets go on sale, such that the deposits may not be satisfied out of event revenues. (*See* A-15170; A-15361; A-8899-8900; A-8918-19.) This last qualification is critical: the ability to push back any obligation to satisfy artist guarantees until after ticket sales commence significantly expands the ability of the promoter to compete for high-guarantee acts. (A-15362.)

The District Court's treatment of this evidence is extremely puzzling. First, according to the District Court, African American promoter Larry Bailey was able in at least one instance to obtain a lower deposit than the standard 50% because of his personal friendship with the artist, Kenny G. (SPA-106; A-3086-89.) Mr. Bailey, however, simply did not claim to have received deposit terms of under 50%. (*See* A-3086-89.) The District Court likewise asserts that black promoter Bill Washington in at least one instance was able to obtain a lower deposit term based on a personal relationship. (SPA-106; A-4818). Here again, however, his deposition does not support that assertion. (*Id.*)[6]

Likewise puzzling is the District Court's treatment of the contract evidence. If the defendants believe that the

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[6] In any event, even if there were one or two—or a handful—of specific situations where black promoters received favored terms, because of a special relationship or some other reason, that would not ameliorate the staggering disparity in standard terms, given the thousands of contracts providing favored terms to the white promoters.

batch of 2600 contracts in the record are a poor sample—(*see* SPA-106-07)—they are free to produce counter-examples at trial, blunting the impact of evidence that otherwise shows the dominant white promoters *always* get 0 to 10% terms, and that black promoters *never* receive such terms. But they certainly have made no such showing on summary judgment.

One stark example of the application of these disparate terms was the 1999 tour of R&B artist Lauryn Hill. Black promoter Al Haymon contracted with WMA for five March dates on that tour, each of them secured by a 50% advance deposit of the artist guarantee. (A-15136-38.) Promoter Defendant Jam contracted with WMA for two February dates, with 10% deposit terms. (A-15140.)[7]

E. Contacts Between Plaintiffs And Booking Agency Defendants

In addition to the general evidence indicating disparate and race-based application of contractual terms, the Booking Agency Defendants' disparate treatment of black promoters is evident in certain specific artist tours and concerts.

1997 Toni Braxton Tour: In 1995, Plaintiff Rowe was a principal promoter of singer Toni Braxton's tour. (SPA-73-75.) At the time, Ms. Braxton was not yet famous,

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[7] The Haymon-WMA contracts for Ms. Hill's concerts, which were produced by the Defendants in discovery, are not signed. (*See* SPA-85.) However, it is undisputed Haymon contracted for these dates; plaintiffs made these same arguments below; and Defendants produced no evidence of any other, non-50% terms. (*See id.*) Interestingly, Haymon had arranged to be a plaintiff in this action until his promotion firm was purchased by industry giant SFX in a transaction that closed some months after the suit was filed at the end of 1998. (SPA-123, A-15623-25). Since becoming part of SFX, Haymon's promotion firm—now SFX's firm—does not pay 50% deposits.

and the 1995 tour helped establish her as a star. (A-5303.) In October 1996, Rowe learned that Ms. Braxton was planning to tour again, and he spoke with Mike Piranian, the CAA agent responsible for the tour, expressing keen interest in promoting it. (A-8885; A-1378.) Initially, Piranian told Rowe that the tour (which featured as co-headliner a white artist, Kenny G, represented by CAA) had been "sold"—i.e., that there were no promotion dates available. (A-8885.) After Rowe protested in a call the following day, Piranian quoted Rowe—on a "take-it-or-leave-it basis"—minimum artist guarantees of $225,000-$275,000, with a firm 50% deposit for all shows. (A-8885.) In reality, CAA and WMA had offered the usual pack of dominant white promoters minimum guarantees of $125,000-$175,000,[8] with a 0-10% deposit. (*See* A-1412, A-1377).[9]

1998 Janet Jackson Tour: Long before a 1998 Janet Jackson tour was announced, Rowe began calling CAA agent Rob Light, who represented Ms. Jackson, expressing interest in submitting a bid for an upcoming national

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[8] Larry Bailey, a black promoter, was also included with the lower guarantee because of Kenny G's request given their long standing relationship. (A-1412; *see also* A-3087 (Bailey testimony reflecting long-standing relationship with Kenny G).)

[9] Judge Patterson erroneously discounted this evidence, because he found the evidence (contracts between concert venues and white promoters) showed that white promoters were given similar deposits and guaranteed minimum terms. (SPA-139.) But he ignored evidence that when the deposit requirement for Kenny G/Toni Braxton concerts was eliminated and the guaranteed minimum reduced for these white promoters, plaintiffs were not informed, (A-5305), putting black promoters at a disadvantage. At a minimum this change in terms, and the lack of notice to the plaintiffs created a question of fact as to whether black promoters faced different terms for obtaining concert deals, which Judge Patterson improperly resolved in defendants' favor.

tour. (SPA-143.) In February 1998, Light informed Rowe that the minimum artist guarantee would be $300,000 per show. (A-5307.) Rowe, who had a successful promotion history with the Jackson family, then submitted in writing to CAA an offer of $300,000 per concert. (A-8627-28.) On February 20, 1998 Rowe sent another letter to Mr. Light reiterating the offer and asking for more information concerning the tour, to allow him to add more detailed terms to his bid. (A-8706-07.) In that letter, Mr. Rowe also specified some of the markets in which the other Plaintiffs were available to promote or co-promote. (A-8706-07.)

Meanwhile, CAA was in negotiations with a white-owned promotion firm, Magicworks, for the Janet Jackson tour. (A-15310-11.) Throughout late February 1998, Magicworks refined its bid several times in response to additional information received from CAA. (*See generally* A-15310-13, 15332-33.) By March 3, 1998, CAA agent Carole Kinzel had received a deal memo for Magicworks. (A-15337.) The next day, Light sent Rowe a letter in response to his offers and calls, advising that CAA required a 50% deposit of the guarantee due prior to the first on sale date along with an irrevocable letter of credit securing the balance of the guarantee, both due prior to the first "on sale" date for the tour. (A-8709; A-1362.) Mr. Light further stated that Rowe had until close of business to make a binding commitment to these terms. (A-8709; A-1362.) Because Light had previously told Rowe that the minimum artist guarantee for the tour was $12 million (or $300,000 per show). (SPA-143-44.) In essence, Rowe had to commit $12 million.

Unable to secure $12 million in commitments in five hours, Rowe did not meet CAA's terms. (A-5307.) But then again, neither did Magicworks. It turns out that Magicworks and CAA had reached an agreement under

which the promoter would pay per-concert artist guarantees of $275,000, as opposed to the $300,000 offer from Rowe. (*See, e.g.*, A-8712-19.) Further, unlike the terms offered Rowe—who would have to post a full $12 million *before* the on-sale date—Magicworks was required to post no more than $3 million in guarantees prior to the on-sale date. (A-8712-19.) Another $2 million in "deposit" guarantees were payable *after* tickets went on sale—and were thus payable out of revenues—and the balance, far from being secured by a letter of credit that had to be posted before the on-sale date—was payable in $150,000 installments on each night of the 40 night concert tour. (A-8712-19; A-15301-15305.)

As though to drive home the racially-based nature of Mr. Light's efforts to prevent Rowe and his colleagues from competing fairly for the Janet Jackson tour promotion, CAA agent Carole Kinzel wrote in a handwritten note: "**[Do] Not Divulge Guarantee re Black Promoters.**" (A-15795.) Subsequently, Ms. Kinzel disingenuously explained that when she wrote "Black Promoters," what she really meant was "anyone." (A-8603).

In any event, after learning that a rival promoter had "won" the bid, Rowe asked CAA's Mr. Light if Magicworks had been required to post the full $12 million up front. Light assured Rowe that the answer was "yes"—Magicworks had indeed been held to the same terms Rowe had been quoted. (A-5310.) Rowe then contacted Magicworks in an effort to subcontract some of the Janet Jackson concert dates for himself and other black promoters. (A-8729-30.) In a letter dated March 16, 1998, Magicworks' agent Brad Wavra, acting in collusion with CAA agent Ms. Kinzel, to whom he faxed a draft of the letter on the same day stated: "the deal on this tour is simply $375,000 guarantee . . . for the 'A' markets like

New York, Chicago, Detroit, Washington DC, etc. and $325,000 . . . for the other markets. Fifty percent of the guarantee needs to be wired transferred before you go on sale. [. . .] This is the same deal that is being offered to everyone." (A-8732 (letter from Magicworks to Rowe found in CAA files and showing fax notation to Carole Kinzel).) Ms. Kinzel, of course, knew this was untrue, having seen this fax that day, and took no steps to correct it. In other words, having kept Rowe from competing for the national tour on a level playing field, CAA thus endeavored with Wavra through blatant deception to keep Rowe and the other Plaintiffs from obtaining dates as co-promoters as well. Yet, CAA and Magicworks were once again offering the white promoters, including Defendant Beaver, considerably more favorable terms than those offered to Plaintiffs. For instance, Beaver was given a co-promotion contract in New Orleans, a top market, for a guarantee of $205,000, with a deposit of 10% which CAA allowed it to pay only 13 days prior to performance. (A-14285-86.) Similar terms to those given Beaver were given to many other white co-promoters on the Janet Jackson tour. (*See, e.g.*, A-12753; A-12758-59; A-12762-64; A-12767; A-12771; A-12805; A-12875-78; A-12880-81; A-12883-84; A-12997-98; A-13000-01; A-13046-07; A-13049; A-13058-59.)

In the end, through deception, Defendant CAA successfully steered the Janet Jackson tour to favored white promoters for inferior artist guarantees, deposits and other financial terms.[10] By thwarting a formal bid from Rowe, Mr. Light's misrepresentations allowed CAA to

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[10] Despite the unfavorable treatment and disparate terms that Defendant CAA, together with white promoter Magicworks, gave to Plaintiffs, they still agreed to pay the higher guarantee and were thus able to at least take part in two dates, with just one third participation. (*See* A-1470-73.)

avoid explaining to an African American artist why a superior bid from a black promoter was rejected in favor of an inferior bid from a white promoter cohort. Accordingly, in an internal memo regarding the Janet Jackson tour, CAA agent Kinzel wrote "Black Promoter Issue - Rob Light kept this situation under control. Magic[works] was helpless on this issue." (A-15717-18).[11]

***1998 Maxwell Tour*:** Increasingly frustrated with the inability of the black promoters to obtain a fair opportunity to compete for major acts, Rowe wrote a series of letters on behalf of the Black Promoters Association to WMA and CAA in 1997 and 1998. (*See e.g.*, A-8956-59, A-15113-20, A-15122-32.) In July 1998, Rowe contacted WMA booking agent Jeff Frasco and inquired about the opportunity to bid on an upcoming tour by the singer Maxwell. (A-8880.) Frasco confirmed that Maxwell was going on tour and promised "to include black promoters on the tour." (A-8880.) Shortly thereafter, Rowe submitted firm offers for seven tour dates. (A-2179; A-8966-67.)

Under pressure to hire a black promoter for a national tour, WMA announced that Magic Johnson Productions, a new promotion company set up by the basketball legend (who was a WMA client), had been selected to promote the national Maxwell tour. (A-2187.) Rowe congratulated Johnson warmly on his having been awarded "exclusive rights" to the national Maxwell tour, and the two men met and discussed Johnson's plans to make extensive use of black co-promoters throughout the United States. (*See* A-2190-92.)

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[11] The trial court appears to have ignored this piece of evidence, never maintaining Kinzel's memo, or her handwritten "Do Not Divulge" note in its lengthy opinion.

It turns out, however, that Magic Johnson had not been granted "exclusive rights" at all; nor had it been granted the standard right—universally accorded any lead or national promoter—to "secure the correct local promoters for each market." (A-11291.) Instead, WMA apparently "pre-sold" the various venues on the tour to the usual members of the "good old boys' network," as reflected in a WMA chart dated August 5, 1998 showing the agency had solicited bids from dominant white promoters in each region before ostensibly awarding the "rights" to Magic Johnson. (A-14879.) Several weeks later, WMA laid to rest any doubt that the Magic Johnson deal was an exercise in pure tokenism, as it circulated a letter mandating that Magic Johnson Productions would work "in partnership with" the usual group of promoters who were all handpicked by WMA. (A-14879.) Stripping away the euphemism, WMA's letter confirmed that Magic Johnson had no power to hire black promoters or any other co-promoters, and, remarkably, denied the putative national promoter the power to promote shows on its own. (A-2173.)

Meanwhile, as it surreptitiously collected bids from the usual suspects for dates on the Maxwell tour, WMA never contacted Rowe to follow up on the seven firm offers he submitted in July. (A-2172.) And in fact, in both New York and Los Angeles, Rowe outbid the winning bidder by 25%, and his opening bid tied the winning bid in Chicago, Detroit and Atlanta. (*See* A-2179-81; A-8966-67.)

***1997 Erykah Badu Tour*:** Plaintiff Boseman specifically called Cara Lewis at WMA in January 1997, to inquire about a forthcoming tour by black artist Erykah Badu. (A-8900.) Boseman was informed that Badu was not going out on tour, and Boseman thus did not propose dates or other venues. (SPA-116; A-3273-74.) Later, in

March, Boseman was in the office of former promoter defendant Slater and he heard Mr. Slater call Cara Lewis about Ms. Badu's availability. (SPA-116; A-3274-82.) As Boseman testified, he gathered from that call that "Ms. Lewis had told [Slater] that [Ms. Badu] was going to do some dates." (SPA 116-17; SPA-3274-82.) Mr. Boseman further testified that, a week or two later, Mr. Slater and his partner told him that "they had selected a venue and Ms. Lewis had told him also that if they do business with Sun Song, that she wouldn't do any business with them any further." (SPA-117; A-3280-81.) By denying the existence of an upcoming tour, WMA prevented Boseman from submitting a bid to promote WMA's client Badu. Even with the later knowledge that Badu was in fact touring, Ms. Lewis made it clear that WMA did not want to work with Boseman anyhow.

Other Contacts With Booking Agency Defendants: As noted above, Rowe wrote several letters to the Booking Agency Defendants WMA and CAA in 1997 and 1998. (*See e.g.*, A-8956-59, A-15113-20, A-15122-32.) In those letters, he clearly expressed the interest of all four Plaintiffs in promoting premier white (as well as superstar black) clients of WMA and CAA. In a letter to WMA agent Richard Rosenberg dated April 14, 1998, Rowe wrote "[y]ou once admitted to me . . . that there was something wrong with white . . . promoters being solicited for both white and black entertainers, while black promoters only have the opportunity to work black entertainers." (A-8956-59; A-15888 (Rosenberg admitting he discussed letter with numerous colleagues).) The Plaintiffs also expressed, both in writing and verbally, interest in promoting a number of specific clients of WMA and CAA (*See, e.g.*, A-8961-64). His request went unanswered.

F. Facts Relating To Defendant Beaver Promotions

***Mud Island*:** In 1992, Plaintiff Fred Jones approached Bob Kelley, a white promoter in Memphis, to form a partnership to become the exclusive concert promoter at the Mud Island Amphitheater, a venue owned by the City of Memphis. (SPA-57; A-17608.58.) Jones and Kelley, through their respective companies, then formed a partnership named "Island Events," which entered into a series of exclusive agreements and renewals with the City of Memphis to promote concerts at Mud Island. (SPA-57; A-17608.53-54). Plaintiff Jones was personally involved in the promotion of all shows produced at Mud Island from 1993 to 1997. (A-17608.59.)

Early in 1998, Island Events had renegotiated its exclusive contract, and a draft of the agreement was approved by the staff of the Memphis Park Commission ("MPC"). (A-15170.) On March 4, 1998, Bob Fouche, acting manager at MPC, sent a draft of the agreement to the Park Commission Board for its review. (A-731-40; A-761.) On March 27, however, Bob Kelley died. (A-15170.) As a result, a new agreement was drafted in which Summitt was to have an exclusive promotion agreement at Mud Island for two years, with a potential third year contingent on Summitt's performance. (A-15171.)

On April 17, 1998, Plaintiff Jones informed the Mayor that the Park Board had approved his exclusive agreement for Mud Island. (A-15171.) The Mayor said that "he was fine with the contract going along" as planned. (A-15171.) Three days later, on April 20, 1998, the Board of the Memphis Park Commission formally approved the agreement with Summitt. (A-15171.)

On April 20, 1998, Mr. Jones faxed letters to WMA, CAA, and Renaissance, among others, advising them that "Summitt Management Corporation, will exclu-

sively book the [Mud Island] amphitheater. We have a multi-year agreement with the city of Memphis into the next millennium." (A-15171.)

Barry Leff, vice-president of Beaver, immediately sent a letter to Wayne Boyer, Director of the Memphis Park Commission, which had already approved Plaintiff Summitt's exclusive contract. (A-761; A-815.) In its entirety, the letter reads:

> I understand today you are considering an exclusive agreement on the future of Mud Island this summer. I want to inform you that because of the unfortunate circumstances with Mid-South Concerts [Mr. Kelley's company], **my company has been asked by the top talent agencies in the country to establish an office in Memphis and begin immediately booking all venues in the area.** We produce about 200 shows across North America every year, and **because of our relationship with Bob Kelly [sic] we have always stayed out of your market.**
>
> As of this past Friday, we have hired Susan Green, former V.P. of Mid-South Concerts. We are in the process of opening an office in Memphis and plan to hire additional staff members. We have already begun to actively pursue shows in the market and are very much looking forward to doing shows in your facility.
>
> If however, an exclusive agreement is entered into with any other party, it will cause us to take our shows to other facilities in the market. I want to make it clear that we understand your concern for getting shows into Mud Island this summer, and we can and will help you do that. I would like to suggest because of the timing of all the events that have surrounded the 1998 season, that you keep your

> facility open to all promoters this summer. This will allow you to judge the true intent of all outside promoters.
>
> Beaver Productions is very excited about our future in Memphis. Please keep your doors open and allow us to show you what a great business relationship we can have together.

(A-761.)

The very next day, the Chairman of the MPC wrote Plaintiff Jones to advise that the Mayor had determined, suddenly, that it would be unwise to execute the exclusive agreement with Summitt. (A-763-64.) At his deposition, the Mayor claimed he could not recall whether or not he had seen Beaver's letter; he just changed his mind—after six years of executing and renewing exclusive contracts—and suddenly decided an exclusive arrangement was a bad idea. (SPA-99-100.)[12]

In this same time frame—April 20 or 21, 1998—Defendant WMA also advised Plaintiff Jones that it was canceling the engagement that Island Events had to promote a James Taylor concert at Mud Island on June 23 and 24; instead, WMA determined to move the James Taylor concerts for those nights to another Memphis venue, where the performance would be promoted by Beaver. (A-9119-9122, A-15173). Ultimately, the swift preventive actions of WMA and Beaver spared Memphis from experiencing its first ever black promoter of an established white act.

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[12] The District Court essentially dismisses Plaintiffs allegations regarding Mud Island on the grounds that Plaintiffs have no direct evidence that the former Mayor is not telling the truth. (SPA-99-102.) Plaintiff Jones, however, is entitled to suggest to a jury that Mayor Herenton's testimony is totally absurd on its face.

STANDARD OF REVIEW

A district court's grant of summary judgment must be reviewed *de novo*, applying the same standard as the district court, viewing the evidence in the light most favorable to the party opposing summary judgment. *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 133 (2d Cir. 2000). Summary judgment precludes a party from his day in court, *id.* at 134; *see also H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1011 (2d Cir. 1989), and is generally recognized to be a particularly extreme remedy in discrimination cases. Thus, on appeal, "an extra measure of caution [is required before] affirming summary judgment in a discrimination action because direct evidence of discriminatory intent is rare and such intent often must be inferred from circumstantial evidence found in affidavits and depositions." *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 69 (2d Cir. 2001); *see also Carlton*, 202 F.3d at 134 (2d Cir. 2000); *Gallo v. Prudential Residential Serv., Ltd. P'ship*, 22 F.3d 1219, 1224 (2d Cir. 1994); *Montana v. First Fed. Sav. & Loan Ass'n*, 869 F.2d 100, 103 (2d Cir. 1989).

Significantly, contrary to what Judge Patterson admittedly did here in **"weighing all the evidence,"** (SPA-173), a court must not resolve material factual disputes on summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55 (1986); *Dawson v. County of Westchester*, 373 F.3d 265, 272 (2d Cir. 2004); *Samuels v. Mockry*, 77 F.3d 34, 36 (2d Cir. 1996); *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 58 (2d Cir. 1987); *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975). Indeed, if there is "any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party," then the court must deny summary

judgment. *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2d Cir. 1995). And, where an inference in favor of the nonmoving party could be drawn by a fact finder considering the case not just piecemeal but in its totality, the court cannot decide whether or not to draw the inference, or even which inferences to draw. Rather, it must decline summary judgment and send the case to trial. *See id.*

In literally hundreds of instances, Judge Patterson did not grant Plaintiffs the deference they are due at the summary judgment stage. Instead of reviewing evidence in the light most favorable to Plaintiffs, and requiring them simply to demonstrate triable fact questions, Judge Patterson assumed the role appropriately left to the jury: he weighed the credibility of testimonial and documentary evidence and resolved disputed inferences, always in defendants' favor. Plaintiffs demonstrate below many, but not all, of the instances in which Judge Patterson resolved those issues in defendants favor, and otherwise improperly disregarded Plaintiffs' evidence. The cumulative impact of Judge Patterson's treatment of these material factual disputes was that Plaintiffs were saddled with a burden of proving each element of their civil rights and antitrust claims that would be appropriate at trial, but far exceeded their obligation at the summary judgment stage. As further detailed below, this error, alone, requires reversal.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS AGAINST THE BOOKING AGENCY DEFENDANTS UNDER 42 U.S.C. § 1981

The district court erred in determining that no disputed issues of material fact exist with respect to Plaintiffs' claims that the Booking Agency Defendants discriminated against them on the basis of race in connection with "the mak[ing] and enforce[ing] of a Contract," in violation of 42 U.S.C. § 1981 (2004). Section 1981 has been interpreted as a prohibition against racial discrimination in the making and enforcement of private contracts. *Runyon v. McCrary*, 427 U.S. 160, 168 (1976); *Patterson v. McLean Credit Union*, 491 U.S. 164, 170 (1989). "The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms." *Patterson*, 491 U.S. at 176-77. It is further clear that, "[w]hen a person is deterred, because of his race, from even entering negotiations, his equal opportunity to contract is denied as effectively as if he were discouraged by an offer of less favorable terms." *Patterson*, 491 U.S. at 209 n. 13 (Brennan, J. concurring in part) (citations omitted).

Claims for discrimination under Section 1981 are properly governed by the standards established under Title VII and, in particular, the three-part burden shifting regime of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *See Patterson*, 491 U.S. at 186; *see also* SPA-45.

Under the familiar *McDonnell Douglas* test:

(1) A plaintiff must establish a prima facie case of discrimination;

(2) The defendant must articulate a legitimate, non-discriminatory reason for the adverse action; and

(3) If the defendants meets that burden, the plaintiff must prove that articulated justification is in fact a pretext for discrimination.

McDonnell Douglas, 411 U.S. at 802; *Texas Dept. of Comty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

As shown below, the Plaintiffs have clearly satisfied the *McDonnell Douglas* burden-shifting test, and the District Court erred by granting Defendants' motion for summary judgment.

A. Plaintiffs Have Clearly Made Out A Prima Facie Case of Discrimination

To establish a prima facie case, a plaintiff must show:

(1) that he is a member of a protected class;

(2) that he was at least minimally qualified for the position in question;

(3) that he applied for that position (or that the application element is excused); and

(4) that he was rejected under circumstances which give rise to an inference of unlawful discrimination.[13]

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[13] In reciting these factors, most courts combine the second and third prong into one requirement, stating that the plaintiff must show she was "qualified for the job for which she applied." *See, e.g., Howley v. Town of Stratford*, 217 F.3d 141, 150 (2d Cir. 2000). Logically,

See generally Burdine, 450 U.S. at 253 (1981); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 357-58 (1977). This Court has repeatedly characterized the plaintiff's burden in making this prima facie showing as "*de minimis.*" *See St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 506 (1993) (discussing "minimal requirements" of prima facie case); *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467 (2d Cir. 2001); *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) ("[T]he burden that must be met by an employment discrimination plaintiff to survive a summary judgment motion at the prima facie stage is *de minimis.*") (internal quotation marks omitted).

As set forth below, the District Court erred in granting Defendants' motion for summary judgment on these claims.

1. Plaintiffs Are Members Of A Protected Class

At the outset, it is undisputed that the individual Plaintiffs are all African Americans, and that the corporate Plaintiffs are wholly owned by the individual Plaintiffs. (SPA-2.) Accordingly, there is no question that this requirement is satisfied.

2. Plaintiffs Possessed "The Basic Skills Necessary For The Job"

In determining that the Plaintiffs failed to demonstrate the necessary qualifications, the District Court applied the wrong legal standard and overlooked a plethora of competent evidence that amply satisfies this prong of the prima facie test.

The appropriate inquiry is whether the Plaintiffs, at the very least, possess the basic skills necessary to serve

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however, the application and qualification requirements are clearly distinct and thus are treated separately here.

as promoters for the Booking Agency Defendants' clients: "*McDonnell Douglas* requires only a minimal showing of qualification to establish a *prima facie* claim. [A plaintiff] only needs to demonstrate that she 'possesses the basic skills necessary for performance of the job.'" *Owens v. New York City Housing Auth.*, 934 F.2d 405, 409 (2d Cir. 1991) *cert. denied*, 502 U.S. 964 (1991) (quoting *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1155 (2d Cir. 1978)). The District Court, however, sought only to determine whether Plaintiffs "had a record of successful contemporary music concert promotion remotely equal to that of the concert Promoter Defendants." (SPA-47.) At the prima facie stage, this is patently the wrong analysis.

The question at this stage is not whether the Plaintiffs were as qualified as the white promoter Defendants, or whether they possessed optimal qualifications: "To satisfy the second element of the test, [plaintiff] need not demonstrate that his performance was flawless or superior." *De la Cruz v. New York City Human Res. Admin.*, 82 F.3d 16, 20 (2d Cir. 1996); *see also Gregory v. Daly*, 243 F.3d 687, 696 (2d Cir. 2001) ("[T]he plaintiff need not show perfect performance or even average performance.") (internal quotation marked omitted).

Indeed, the fact that another applicant has superior qualifications may (or may not) provide a legitimate nondiscriminatory justification for a defendant's actions, but it has no bearing at all on the prima facie question of whether the plaintiff was at least minimally qualified, under the clear case law of this Court:

> The qualification prong must not, however, be interpreted in such a way as to shift onto the plaintiff an obligation to anticipate and disprove, in his prima facie case, the employer's proffer of a legitimate, non-discriminatory basis for its decision. As we

> have repeatedly held, the qualification necessary to shift the burden to defendant for an explanation of the adverse job action is minimal; plaintiff must show only that he "possesses the basic skills necessary for performance of [the] job."

Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 92 (2d Cir. 2001) (citations omitted); *see also Daly*, 243 F.3d at 696.

In the instant case, there can be little question that each of the Plaintiffs, at the very least, "possesses the basic skills necessary for performance of [the] job." *Slattery*, 248 F.3d at 92; *Daly*, 243 F.3d at 696. Among the evidence submitted in this regard was:

- Plaintiff Rowe has more than 26 years experience as a professional concert promoter. Among other relevant experience, Rowe was the lead promoter for the African American musical "Sugar Daddy," a 50-city, 122-show tour in 2000; has successfully acted as a main promoter for The Jacksons, The Temptations, Diana Ross and many other prominent acts (*See* Statement of Facts, Part A(1)); was co-promoter for a number of dates on the 1998 national tour of superstar Toni Braxton (A-75-76); and co-promoted two dates on Janet Jackson's 1998 tour. (A-1470-73.)[14]

- Plaintiff Boseman was the national co-promoter of The Jacksons' Victory Tour in 1984; co-promoted the Janet Jackson 1998 concert at Madi-

[14] The District Court erred in discounting Rowe's testimony as evidence, made on personal knowledge, of the scope of his track record as a promoter. (SPA-49-50). Surely, this evidence was sufficient to, at a minimum, create a factual dispute regarding Rowe's track record.

son Square Garden (A-5003); promoted the Def Jam Comedy Tour in five U.S. cities in 1999 and 2000; was the lead promoter for Luther Vandross in 1986 among other artists.[15] (*See* Statement of Facts, above at Part A(1)).

- Plaintiff King, during the course of a 30 year career in promotion, has promoted artists such as James Brown, Chaka Kahn, Earth, Wind and Fire, the Commodores, Lionel Richie, the Jacksons, Patti LaBelle, Janet Jackson, Teddy Pendergrass and Puff Daddy, among others, mostly in the Southeast. (*See* Statement of Facts, above at Part A(1)).
- Plaintiff Jones, by defendants' own acknowledgment, has been a successful promoter "for many years." (A-9011-12). Mr. Jones has promoted concerts by scores of top named acts at, among others, the Mud Island Amphitheater in Memphis, where he had primary day-to-day responsibilities for promoting concerts for Island Events. (*See* Statement of Facts, above at Part A(1); A-3832-35.)

The conclusion that the Plaintiffs possess the minimal requisite "basic skills" is further buttressed by the very fact that the Booking Agency Defendants have themselves hired or sought to hire Plaintiffs to promote concerts. CAA's Mr. Light testified that in 2002, well after the beginning of this litigation, he informed the Plaintiffs that Gloria Estefan and Stevie Wonder would be on

[15] Surely, the evidence regarding Boseman's track record as a promoter, including his experience promoting Luther Vandross in the 1980's (A-3169-70), was sufficient, at a minimum, to create a factual dispute as to his record as a promoter.

tour and invited them to submit offers. (A-1411). Dennis Ashley of CAA also contacted Mr. Rowe about submitting bids for black artists Kelly Price, Mary J. Blige and K-Ci & Jo Jo. (SPA-157.) In addition, CAA ultimately did contract with Plaintiff Rowe to co-promote numerous dates for Kenny G/Toni Braxton, (A-5129; A-4704), and for Janet Jackson concerts in 1998. (A-1470-73.)

While many of these offers may have been less lucrative than the concerts offered to comparable white promoters—and while Plaintiffs may have declined some of these opportunities, for whatever reasons[16]—the point here is that the defendants must have believed Plaintiffs to "possess the basic skills necessary for performance of [the] job." *Slattery*, 248 F.3d at 92; *Daly*, 243 F.3d at 696. As this Court has repeatedly recognized in the employment context, where "the employer has already hired the employee into the job in question, the inference of minimal qualification is, of course, easier to draw. . . ." *Daly*, 243 F.3d at 696.

Moreover, it is significant that the Booking Agency Defendants never applied any financial means criteria in selecting promoters.[17] In determining whether Plaintiffs "possess the basic skills necessary for performance of [the] job," *id.*, it is clearly relevant to examine the *actual* criteria used by the defendants. Unlike the after-the-fact criteria proffered by Defendants' experts in their summary judgment submissions, the criteria employed by the

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[16] Stevie Wonder, for whom Rowe bid $200,000 per show, cancelled his tour, and Mr. Rowe concluded the Estefan engagement would not be profitable, (SPA-156-57), and indeed, her tour was cancelled as well.

[17] At a minimum, Plaintiffs presented sufficient evidence to dispute the extent to which "financial wherewithal"—whatever that means—was a criteria used in choosing a promoter prior to the advent of this lawsuit.

Booking Agency Defendants in the real world simply did not include any financial means test. The evidentiary record does not disclose a single instance in which the Booking Agency Defendants inquired regarding any of Plaintiffs' financial wherewithal.[18] Nor, apparently, did they inquire into the financial wherewithal of other promoters, many of whom were no more able to absorb losses than the Plaintiffs. (*See, e.g.*, A-10818-19; A-11230-11243; A-5049.) As Plaintiff Boseman testified in his deposition, his promotion company has *never once* been requested to submit any financial data in connection with a bid. (*See, e.g.*, A-3205.)

The District Court further ruled that Plaintiff Rowe was not qualified because of arrests or convictions in the 1980's for passing or cashing bad checks. (SPA 50-51.) If the District Court meant to imply that the Respondents rejected Rowe on this basis, it clearly erred, as the Respondents only learned of these arrests in discovery. If, on the other hand, the suggestion is that an arrest record of this nature objectively disqualifies one from promoting popular music concerts, the ruling is even more erroneous. The record shows that white promoter Richard Klotzman was convicted of fraud, wire fraud, conversion and income tax evasion related to a non-existent Prince concert, and was sentenced to 5 years imprisonment in 1987 (and had previously been convicted of income tax evasion for which he served four months), and yet WMA continued to do business with him on a regular basis (A-10818-19; A-11230-44.) Likewise, Bruce Kapp, also a white promoter, was convicted of fraud relating to his concert promoting activities, and yet

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[18] Had Defendants solicited any financial information from promoters, they would have learned that Plaintiff Jones had a net worth of more than $2.4 million.

all the Booking Agency Defendants do business with him. (A-11302-05.)

3. Plaintiffs Took All Reasonable Steps To Bid For The Contracts At Issue, And Further Bids Would Have Been Futile

The requirement that a plaintiff must have applied for the position or contract sought is amply met in this case because: (a) Plaintiffs took all reasonable steps to advise the Defendants of their interest in promoting their clients' acts; and (b) in any event, submission of more detailed bids would have been futile as a matter of law.

a. Plaintiffs Sufficiently Advised The Defendants Of Their Interest In Promoting The Acts At Issue

The appropriate legal question here is whether the Plaintiffs took reasonable steps to advise the Booking Agency Defendants of their interest in promoting a certain class of concert acts. Where, as here, it is undisputed that the Defendants never notified the Plaintiffs of particular bidding opportunities, there is simply no requirement under the law of this Circuit that Plaintiffs show they submitted bids for specific concerts and tours. The requirement of showing that plaintiff:

> applied for a specific job . . . does not apply where, as here, the plaintiff indicated to the employer an interest in being promoted to a particular class of positions, but was unaware of specific available positions because the employer never posted them. In such a situation, requiring the plaintiff to show that he or she applied for the specific jobs at issue would be unrealistic, as an employee by definition

cannot apply for a job that he or she does not know exists.

Mauro v. So. New Eng. Telecomms., Inc., 208 F.3d 384, 387 (2d Cir. 2000).

In this case, Plaintiffs have clearly submitted evidence that they took reasonable steps to advise the Booking Agency Defendants of their interest in promoting the Defendants' acts. For instance, in 1997 and 1998, the Black Promoters Association and its President, Plaintiff Rowe, advised WMA and CAA in writing that each of the four Plaintiff firms, and others, wished to be considered for future promotions of white and superstar black acts. (*See, e.g.*, A-8956-59, A-15113-20, A-15122-32.) On behalf of the Black Promoters Association, Rowe also communicated the interests of these promoters orally to WMA, in the strongest possible terms. (A-5600; *see, also, e.g.*, A-8886-87.)

Mr. Rowe further contacted defendant WMA in 1998 specifically advising Cara Lewis that his firm wished to be considered to promote the national tour of WMA client Lauryn Hill. (A-8962-64.) Also, as discussed above at Statement of Facts, Part D, Rowe submitted detailed bids and/or written statements of interest in promoting dates on the tour of WMA client Maxwell, CAA client Janet Jackson, and the joint CAA/WMA tour for Kenny G and Toni Braxton.

Similarly, Plaintiff Boseman advised WMA of his firm's interest in promoting dates on the 1997 Erykah Badu tour. (A-3271-73, A-3281, A-3310-12.) Plaintiff Jones, for his part, *already had* the James Taylor concert at Mud Island before WMA wrenched it away in favor of the white promoter Beaver, (*see* above at Statements of Facts, Part F), and, in any event, faxed a letter to WMA and CAA reiterating his interest in promoting their acts at Mud Island. (A-15171.) Further, Jones and King's

interest in promoting the acts of the Defendant Booking Agencies was clearly conveyed by Mr. Rowe in his letters to the agencies on behalf of the Black Promoters Association. (*See, e.g.*, A-8956-59, A-15113-20, A-15122-32.)

As the opinion below recognized, Plaintiffs Rowe, Jones and Boseman expressed interest in promoting three particularly prominent white artists represented by Renaissance: Britney Spears, N'Sync and The Backstreet Boys. (SPA-165.) Yet, Renaissance never included any black promoter in its solicitation process even after learning of their interest. (*Id.*) Indeed, as with other top booking agencies, there is not a single contract in the record of this case between Renaissance and any black promoter for a major white act.

Finally, it is also relevant here that, in response to these numerous inquiries, the Booking Agency Defendants repeatedly misled Plaintiffs concerning available concert dates and contract terms. Examples include WMA's false statements to Boseman that there were no available Erykah Badu concert dates, when in fact there were; Rob Light's patent deceptions of Mr. Rowe in connection with Janet Jackson; and CAA's outright misrepresentations to Rowe concerning the bid requirements for Kenny G and Toni Braxton, among others. (*See* above at Statement of Facts, Part D). Clearly, a concert promoter cannot bid for a job "that he or she does not know exists." *See Mauro v. So. New Eng. Telecomms., Inc.*, 208 F.3d at 387.

Accordingly, the application element of the prima facie test is plainly satisfied in this case.

b. The Application Requirement Is Excused Becauseof Respondents' Reliance On Non-Objective Criteria

In any event, even if the Plaintiffs had received timely and accurate information concerning specific tours and concerts, the court below nonetheless erred in holding that Plaintiffs' failure to submit specific applications or bids supported the grant of summary judgment. The "application element" of the prima facie test simply does not apply where, as here, the entire selection process employed by the defendant is informal, secretive and based largely on existing relationships:

> when the failure to promote arises out of an informal, secretive selection process, a plaintiff may raise an inference of intentional, racially-disparate treatment without proving that he technically applied for the promotion.

E.E.O.C. v. Metal Serv. Co., 892 F.2d 341, 350 (3d Cir. 1990); *Roberts v. Gadsden Mem'l Hosp.*, 835 F.2d 793, 797 (11th Cir. 1988); *see also Turner v. Honeywell Fed. Mfg. & Techs., L.L.C.*, 336 F.3d 716, 721 (8th Cir. 2003) ("a plaintiff alleging a prima facie case of failure to promote should not bear the same burden when the criteria are subjective and the process 'vague and secretive' as when the case involves 'objective hiring criteria applied to all applicants'") (citing *Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1510 (10th Cir. 1997); *Jindal v. New York State Office of Mental Health*, 728 F. Supp. 1072, 1078 (S.D.Y.N. 1990). The rationale for this rule was succinctly stated by the Eleventh Circuit in *Roberts*: "Informal, secretive and subjective hiring or promotion decision processes tend to facilitate the consideration of impermissible criteria." *Roberts*, 835 F.2d at 798.

In this case, the Booking Agency Defendants' selection processes were paradigmatically "informal, secretive and subjective." As detailed above, (*see* Statement of Facts, Part B), the Defendants assert that long-standing relationships and "trust" comprise the critical factors in their selection processes. (A-17608.3; SPA-10; A-17608.6; A-2716.) As the Booking Defendants emphasized in their Joint Rule 56.1 Statement, "[t]he concert promotion business is built on relationships—with artists, managers, promoters, agents, vendors and radio stations—that are developed and nurtured over time." (A-17608.3.) The same goes for the Promoter Defendants' selection of co-promoters: "Very often, promoters select co-promoters based exclusively on their relationships with other promoters." (A-17608.6-7.)

While the record is replete with evidence that Defendants select promoters based upon subjective, personal criteria, the record is totally devoid of any evidence that the Booking Agency Defendants ever applied any objective criteria to the process of selecting a promoter. The District Court pointed to Plaintiffs' financial histories and the arrest record of Plaintiff Rowe as objective factors. However, it is beyond dispute that these facts were *never* considered by the Booking Agency Defendants in selecting promoters, or by the Promoter Defendants in selecting co-promoters. Prior to taking discovery in this action, the Defendants never solicited any information from Plaintiffs concerning their financial history or wherewithal, much less their arrest records. (*See, e.g.*, A-3205.) Nor did they solicit any such information from white promoters. In reality, they neither possessed nor considered any such information as part of the selection process.

Accordingly, the Booking Agency Defendants' wholesale reliance on non-objective and unpublished selection

criteria "may raise an inference of intentional, racially-disparate treatment without proving that [Plaintiffs] technically applied for the [promotion contracts]." *Roberts*, 835 F.2d at 797.

c. Further Bidding Would Have Been Futile

In addition to the Defendants' reliance on non-objective and unpublished selection criteria, the record reflects ample additional evidence reasonably supporting the inference that application would have been futile, and that the application requirement is thus excused as a matter of law.

The application requirement is excused where "an employer's discriminatory practices deter application or make application a futile endeavor." *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 364-67 (1977); *see also Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1213 (2d Cir. 1993) (plaintiff is not required to show that she applied for position where reasonable "jury could have determined" application would have been futile).

Here, Plaintiffs have offered ample evidence to support the reasonable conclusion that further bidding would have been futile, including information showing that:

- Plaintiffs were repeatedly lied to and ignored by the Booking Agency Defendants, in response to their bids and statements of interest as set forth above at Statement of Facts, Parts D and E. Examples include the misrepresentations made to Rowe concerning the minimums and deposit terms for the Kenny G/Toni Braxton Tour, the Janet Jackson Tour, the Lauryn Hill concert dates, as well as WMA's lies to Bose-

man concerning the Erykah Badu tour. (*See* above Statement of Facts, Part E).

- White promoters were routinely afforded beneficial contractual terms—such as a 0 to 10% deposit requirement, or requiring the deposit only after commencement of ticket sales—while black promoters were uniformly (or almost uniformly) required to post 50% deposits immediately upon contracting. (*See* above Statement of Facts, Part D).

- The concert promotion industry is highly segmented, with dominant white regional promoters obtaining virtually all significant acts in their territories without having to engage in competitive bidding.[19] (*See, e.g.*, A-8941; *see also* above Statement of Facts, Part A.)

- Former WMA Booking Agent Richard Johnson testified that "WMA . . . had a sharp division while I was there that I still believe exists between 'white acts' and 'black acts.' I can recall no instance while I was at WMA where a white artist was promoted by a black promoter. Moreover, in the event a black artist gained cross-over appeal and became a major star, those acts were no longer considered 'black,'

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[19] As discussed further below at pps. 75-84, Judge Patterson dismisses this evidence of territorial division, finding, for example, that WMA's letters to a dominant promoter in the Bay Area to bring down the "walls. . .around the Bay Area" does not supply an inference of an agreed-upon territorial allocation. (SPA-35.) Here again, Judge Patterson held Plaintiffs to too high a standard of proof at the summary judgment stage and resolved inferences in Defendants' favor, rather than limiting his inquiry to whether Plaintiffs' evidence casts doubt on inferences favorable to Defendants.

> and were handed over to a white promoter. . . until that artist's popularity began to fade, in which case their business could be handed back to the black promoter." (A-8942.)

- Only 1.4% of music concert promoters are black. (*See, e.g.*, A-2702; A-2752; *see also*, A-2741; A-2747.)

Faced with these facts, surely a reasonable "jury could have determined" that it would have been futile for Plaintiffs to submit specific bids to promote concerts by white and superstar black clients of WMA and CAA. *Malarkey v. Texaco, Inc.*, 983 F.2d at 1213.[20]

4. The Circumstances Give Rise To An Inference Of Unlawful Discrimination

This final element of the prima facie test is easily satisfied here. Under the law of this Circuit, it is enough for a plaintiff to show that the defendant ultimately filled the position at issue with a non-minority applicant. Indeed, this Court has repeatedly held that the:

> inference of discriminatory intent could be drawn in several circumstances including, but not limited to: the employer's continuing, after discharging the

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[20] The fact that the Booking Agent Defendants may have hired other black promoters, including Magic Johnson, does not immunize them from liability for unlawful discrimination against Plaintiffs. *E.E.O.C. v. Staten Island Sav. Bank*, 207 F.3d 144, 151 (2d Cir. 2000) (proscribing discrimination against an individual because of his or her membership in a protected class); *Brown v. Henderson*, 257 F.3d 246 (2d Cir. 2001) (discrimination against one employee cannot be cured or disproven solely by favorable, or equitable, treatment of other employees of the same race); *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58-59 (4th Cir. 1995); *Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 713 F.2d 940, 953 (2d Cir. 1983).

> plaintiff, to seek applicants from persons of the plaintiff's qualifications to fill that position; or the employer's criticism of the plaintiff's performance in ethnically degrading terms; or its invidious comments about others in the employee's protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff's discharge.

Abdu-Brisson, 239 F.3d at 468 (2d Cir. 2001) (citing *Chambers*, 43 F.3d at 37); *see also Chertkova v. Conn. Gen'l Life Ins. Co.*, 92 F.3d 81, 87 (2d Cir. 1996) ("[A]ffidavits and materials are [sic] before the district court must be carefully scrutinized for circumstantial evidence that could support an inference of discrimination.").

Here, it is undisputed that the Booking Agency Defendants awarded the concert promotion opportunities at issue to white-owned firms, including Defendants Beaver and JAM. In addition, the record contains numerous examples of "more favorable treatment" accorded promoters "not in the protected group," including favorable contractual terms, advance notice of bidding opportunities and dispensation from the requirement to submit bids or post deposits.

A reasonable jury might also infer discrimination from the following two facts: (i) the Booking Agency Defendants did not apply objective, much less published, criteria; and (ii) virtually 100% of the promoters of the Booking Agency Defendants' superstar black or white clients between 1993 and 1997 were white. These two facts, taken together, are more than sufficient to allow a jury to decide whether impermissible discrimination was at work in Defendants' selection processes: "Such an informal hiring process, in conjunction with an all white workforce, is itself strong circumstantial evidence of

discrimination." *E.E.O.C. v. Metal Serv. Co.*, 892 F.2d at 350. Courts have also "held that word-of-mouth hiring which results in a relatively small number of minority applicants is circumstantial evidence which helps to establish a reasonable inference of an employer's discriminatory treatment of blacks as a class." *Id.* at 350 (citing *United States v. Int'l Union of Elevator Constructors, Local Union No. 5*, 538 F.2d 1012, 1016 (3d Cir. 1976)).

Further strongly supporting the inference of discrimination is the staggering disparity in contractual terms outlined above, with dominant white promoters virtually always receiving zero-to-ten percent terms, and black promoters always being required to post 50% deposits. The inference is likewise supported by the testimony of former WMA executive Richard Johnson concerning the historical segregation of the business into white acts and black acts, and the general unwritten policy that black promoters may not promote white acts.[21] If the defendants have submitted *any* evidence that this policy has been relaxed, it is only around the edges, as the record at most reflects one or two stray dates for white acts co-promoted by majority black promoters.

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[21] The district court erroneously refused to give weight to Mr. Johnson's testimony on the grounds that he had ceased working for WMA in 1986. (SPA-7.) Plaintiffs, however, do not seek to use Johnson's testimony as direct evidence in support of their discrimination claims. Any claim based directly on this testimony would concededly be time-barred, as the statutory period commenced in 1994. Instead, the Plaintiffs contend only that Johnson's first-hand account of WMA's practices "supports the inference" of discrimination. Surely, it is for a jury to determine what weight to give Mr. Johnson's testimony, considering (a) that the promotion industry remains virtually all-white; and (b) that there is no evidence of any changes in relevant selection policies by any Booking Agent Defendant since Mr. Johnson left WMA.

The inference of discrimination further finds support in the fact that white promoters were routinely given advance notice of concert promotion opportunities, while black promoters were not. This point is substantiated by letters from the Booking Agency Defendants to white promoters providing advance notice[22]—something none of the black promoter Plaintiffs ever received. (*See, e.g.*, A-8983; A-8986; A-8992-93; A-10913-17; A-10919; A-10920-41; A-10943-83.) This evidence, standing alone, is more than sufficient to raise the inference of discrimination.

Similarly supporting the inference of discrimination is the fact that the Plaintiffs were repeatedly deceived with respect to tour dates and bid requirements, as detailed above, while no white promoters were manipulated in this fashion, so far as appears on the record. WMA's actions in connection with the Mud Island incident likewise suggest that their actions are colored by discriminatory animus.

And of course, the inference of discrimination finds support in the notes of CAA agent Carole Kinzel stating: "[do] not divulge guarantee re black promoters." (A-15795.) These words say it all. So too does the CAA

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[22] The District Court held that these letters from CAA giving notice to white promoters of upcoming performances—none of which were sent to black promoters—are incapable of creating an inference of racial discrimination, since (1) some white promoters did not receive these letters and (2) Plaintiffs did not obtain testimony concerning this letter, thereby denying "Defendants of the opportunity to present a legitimate business reason for these letters." (SPA-130.) But, whether or not all white promoters received them, the record shows that no black promoters did, which is sufficient to raise an inference of discriminatory treatment. Moreover, Defendants had ample opportunity to explain these letters through affidavits—they were thus "deprived" of no such "opportunity." Accordingly, the District Court's rejection of this evidence was error.

memorandum celebrating Mr. Light's massive deception of Plaintiff Rowe as a nifty solution to the inconvenient "Black Promoter Issue." (A-15717-18.)

To say the very least, all of this evidence taken together strongly supports the conclusion that the Booking Agency Defendants accorded "more favorable treatment [to promoters] not in the protected group . . . ." *Abdu-Brisson, Inc.*, 239 F.3d at 468. Accordingly, for all of the above reasons, the Plaintiffs respectfully submit that they have more than satisfied their "*de minimis* burden of establishing a prima facie case." *Chambers*, 43 F.3d at 37.

B. The Booking Agency Defendants' Stated Explanations for not Contracting with Plaintiffs are Pretextual

Under *McDonnell Douglas*, "once the plaintiff has established a prima facie case, defendant must proffer a legitimate, non-discriminatory reason for the adverse action. *McDonnell Douglas*, 411 U.S. at 802. If it does so, then the burden shifts back to the plaintiff to demonstrate pretext. *St. Mary's Honor Center v. Hicks*, 509 U.S. at 502, 507-08 (1993); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1308 (2d Cir. 1995).

The question of whether a defendant's proffered reason is pretextual is peculiarly for the jury, "unless the employer has come forward with evidence of a dispositive nondiscriminatory reason as to which there is no genuine issue and which no rational trier of fact could reject." *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2d Cir. 1995).

In this case, the District Court identified the following non-discriminatory reasons for the adverse actions of the Booking Agency Defendants:

(1) The Booking Agents were following "instructions from their principals" (SPA-139);

(2) Other promoters' financial viability was superior to that of Plaintiffs (SPA-82);

(3) The promoters' exclusive arrangements with venues (SPA-82); and

(4) The Booking Agents had more "trust" in certain promoters' ability to advertise and market concerts than in the Plaintiffs' (SPA-82).

As set forth below, the first three proffered reasons are demonstrably pretextual, while the fourth reason—"trust"—is both pretextual and, in any event, inadequate as a matter of law to support summary judgment.

1. The "Instructions From Principals" Justification Is A Pretext

The nub of this defense is the assertion that artists and their management instruct the Booking Agency Defendants not to contract with the Plaintiffs. The record, however, does not bear out any such claim. In fact, there is no evidence whatsoever that any artist or manager ever instructed any booking agent: (i) not to hire one of the Plaintiffs for any engagement; (ii) to refrain from soliciting bids from Plaintiffs, or from notifying them of upcoming tours or events; or (iii) to hire any other promoter for a job that one of the Plaintiffs had indicated an interest in.

Lacking evidence of any such "client instructions" bearing on the Plaintiffs, the Booking Agency Defendants pointed to evidence that, as a general matter, the ultimate authority for hiring a promoter resides with the artist and his managers. This line of argument—which

was accepted by the District Court—suffers from three infirmities.

First, the claim that artists retain the ultimate authority to hire a promoter—or even that artists often make the hiring decision themselves—is quite different from the claim that it was the client who instructed the Booking Agency Defendants not to contract with the Plaintiffs, or to notify them of bidding opportunities.

Second, even if this general evidence were relevant to the asserted justification, there exists a genuine issue of material fact as to the extent of the Booking Agents' role and authority in the hiring process. The record contains, for example, testimony from a prominent non-party booking agent that "[o]n a scale of 1-to-10, . . . the influence of the agent's recommendation is 'probably in the seven range.' " (A-18617.) Likewise, Bill Cosby testified that 90% of promoters he considered hiring to promote his live comedy shows and other events came through his agent, WMA. (A-18679.1.)

Third, the "my client-made-me-do-it" assertion cannot serve as the basis for a legitimate, non-discriminatory justification for the Booking Agency Defendants' refusal to contract with Plaintiffs. Courts have long recognized that the impermissible bias of a single individual at any stage in the hiring process may taint the ultimate employment decision in violation of applicable law. *Lam v. University of Hawaii*, 40 F.3d 1551, 1560 (9th Cir. 1994). And this Circuit has held that this is true, "even absent evidence of illegitimate bias on the part of the ultimate decisionmaker, so long as the individual shown to have the impermissible bias played a meaningful role in the [hiring or selection] process." *Bickerstaff v. Vassar College*, 196 F.3d 435, 450 (2d Cir. 1999). Where, as here, Plaintiffs offered sufficient evidence to show that the Booking Agency Defendants "played a meaningful

role" in the hiring of promoters generally and the exclusion of Plaintiffs specifically, Defendants cannot now hide behind their artists.

2. The "Finances" Justification Is A Pretext

The Booking Agency Defendants also purport to rely on the Plaintiffs' finances as a justification for refusing to hire them as promoters for a certain category of concerts and tours. This asserted justification is demonstrably false. As this Court has repeatedly held:

> The pretext inquiry . . . normally focuses upon factual questions such as whether the asserted reason for the challenged action comports with the defendant's policies and rules, whether the rule applied to the plaintiff has been applied uniformly, and whether the putative non-discriminatory purpose was stated only after the allegation of discrimination.

DeMarco v. Holy Cross High Sch., 4 F.3d 166, 171 (2d Cir. 1993); *see also Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1015 (2d Cir. 1980) ("If the plaintiff shows that the employer's stated reason for rejecting him was a pretext, such as where the reason was not used to reject white applicants, the employer's reason will not stand.").

Measured against these standards, the proffered "finances" justification clearly fails. As shown above at Argument, Part 3(b), the Defendants never inquired into the financial wherewithal of the Plaintiffs or, for that matter, of any other promoter. Had they inquired, they would have learned, for example, that a white promoter with whom they often conduct business, Alexander Cooley, had filed for bankruptcy, and that one of the Plaintiffs, Fred Jones, had a net worth of more than $2.4 million. (*See* A-17608.28.)

If the Defendants truly did act on the basis of Plaintiffs' financial conditions—notwithstanding that they never sought such data from white promoters—then it is clear that "the rule applied to the plaintiff has [not] been applied uniformly," under *DeMarco*, and the "financial" justification fails. On the other hand, if the Defendants did not act on the basis of Plaintiffs' financial conditions, then this justification is simply a pretext. In any event, the Booking Agency Defendants only learned of the Plaintiffs' financial conditions during discovery in this action. This is quite clearly a case where "the putative non-discriminatory purpose was stated only after the allegation of discrimination." *DeMarco*, 4 F.3d at 171.

3. The Exclusive Venue Justification Is A Pretext

While the District Court cited exclusive booking arrangements with major concert venues as a legitimate non-discriminatory justification, the record contains very little evidence of any such arrangements.[23] Certainly, there is no evidence that any of the scores of concerts in which the Plaintiffs expressed interest or submitted bids was ultimately promoted by someone who owned or had an exclusive booking arrangement with a venue. Accordingly, this justification is clearly pretextual as well.

4. The "Trust" Justification Is A Pretext

The sole remaining proffered reason for the Defendants' actions consists of wholly non-objective factors—specifically, the "trust" that the Booking Agency

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[23] The only promoter to whom such a consideration is relevant is Nederlander Group, which does not figure prominently in the facts of this case. (*See* SPA-75; SPA-106 (Nederlander does not pay deposits due to it owning its own venue).)

Defendants had built up in other promoters. Reliance upon subjective criteria, however, simply does not furnish a basis for resisting a claim of pretext. As this Court has held, "[s]ubjective evaluations are not adequate by themselves [to withstand an assertion of pretext] because they may mask prohibited prejudice." *Sweeney v. Research Found. of State Univ. of New York*, 711 F.2d 1179, 1185 (2d Cir. 1983). Numerous other courts have likewise observed that the use of subjective criteria itself supports a holding of pretext. *See, e.g., Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1217 (10th Cir. 2002) (collecting cases holding that "[e]vidence of pretext may include. . . . the use of subjective criteria")

In any event, this asserted justification really boils down to the assertion that these four promoters—the Plaintiffs—fail to inspire in the Booking Agency Defendants the same level of "trust" as do all of the scores of other promoters they contract with. The record, however, reflects no particular basis for this deficit of "trust." There is no evidence that the Booking Agency Defendants had any negative business experiences with any of the Plaintiffs. So here again, there is more than a whiff of pretext to the Defendants' asserted justification.

In the final analysis, the Booking Agency Defendants' "trust justification" is the very embodiment of a criterion that a "rational trier of fact could reject" in the face of a prima facie showing. *Cronin*, 46 F.3d at 203.

C. The Plaintiffs' Claims Against the Booking Agency Defendants Under 42 U.S.C. § 1981 Should be Tried to a Jury

Focusing on the totality of the evidence in this case, the District Court should have allowed the Plaintiffs claims to proceed to a jury.

1. The District Court Failed To View The Evidence As A Whole

As this Court has repeatedly explained, "[i]n determining the appropriateness of summary judgment, the court should not consider the record solely in piecemeal fashion, giving credence to innocent explanations for individual strands of evidence." *Howley v. Town of Stratford*, 217 F.3d 141, 151 (2d Cir. 2000) (citing *Stern v. Tr. of Columbia Univ.*, 131 F.3d 305, 314 (2d Cir. 1997)). This is so because "a jury, in assessing whether there was impermissible discrimination and whether the defendant's proffered explanation is a pretext for such discrimination, would be entitled to view the evidence as a whole." *Howley*, 217 F.3d at 151; *accord Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 448 (2d Cir. 1999) ("the question is whether the evidence can reasonably and logically give rise to an inference of discrimination under all of the circumstances. As a jury would be entitled to review the evidence as a whole, courts must not view the evidence in piecemeal fashion in determining whether there is a trial-worthy issue") (emphasis added); *see also Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 57 (2d Cir. 1998) (same).

The District Court's opinion in this case, while undeniably detailed, is an extreme example of "view[ing] the evidence in piecemeal fashion in determining whether there is a trial-worthy issue." *Bickerstaff*, 196 F.3d at 448. The District Court took each atomized allegation of each Plaintiff and ran it through the *McDonnell Douglas* machinery to determine whether, standing alone, it created a trial-worthy case. Thus the District Court analyzed, for example, whether the evidence of WMA's misrepresentations to Plaintiff Boseman concerning the Erykah Badu tour, standing alone, could support liability under the *McDonnell Douglas* burden shifting

regime, or whether Plaintiffs proved pretext in connection with CAA's assertion that Janet Jackson's management wanted a 50% deposit before the on-sale date (putting aside that they never received such a deposit, which ought to be dispositive). There are many other such examples throughout the Court's in-depth opinion.

This focus on each individual deal misses the point. The primary issue is not, for example, whether Plaintiff Boseman's rights were violated by receiving false information about a concert date in 1998. The primary issue is whether the Booking Agency Defendants fail to provide African American promoters sufficient notice and information to allow them to compete on a level field of play, and whether they receive disparate terms of contract. To assess that question, it is just not sufficient to isolate one incident and run it through the *McDonnell Douglas* mill. This is all the more true given that Plaintiffs seek injunctive relief specifically requiring the provision of timely notice to promoters who have expressed interest in promoting a particular act, irrespective of race.[24]

At the heart of this case is the charge that the Plaintiffs are not afforded the opportunity to compete on an even playing field for contracts to promote premiere acts of the Booking Agency Defendants, for reasons related to race. The fact that Plaintiffs receive inferior notice, inferior information, inferior financial terms and inferior opportunities is hardly in dispute. The question—and it is a serious question—is whether racial animus underlies, to any degree, the Defendants' provision of inferior opportunities to the Plaintiffs. To answer *that* question, it is patently necessary to look at *all* of the evidence—all of the inferior contract terms, all of the inferior notice,

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[24] Far from being a "Herculean task," (*see* SPA-158-59), this may prove as simple as posting data on a website.

all of the disparate treatment on various deals, along with the racial history of the industry and other factors, and then to ask: "does all of this, taken together, support an inference that the Defendants' failure to provide notice and bidding opportunities is related to race?"

2. The Issue Of Pretext Is For The Jury

The issue here is whether a jury should evaluate the "proffered nondiscriminatory reason[s]" supporting the defendants' failure—as a general matter, and across the board—to provide Plaintiffs notice of bidding opportunities or to allow them to contract on terms that are routinely doled out to white promoters. Plainly, the answer is "yes." The pertinent legal standards are familiar:

> Direct evidence of discrimination is not necessary . . . because proof is seldom available with respect to an employer's mental processes. Instead, plaintiffs in discrimination suits often must rely on the *cumulative weight of circumstantial evidence*. . . Ordinarily, plaintiff's evidence establishing a prima facie case and defendant's production of a nondiscriminatory reason for the employment action raise a question of fact to be resolved by the factfinder after a trial. . . . Summary judgment is appropriate at this point only if the employer's nondiscriminatory reason is dispositive and forecloses any issue of material fact.

Carlton v. Mystic Transp., Inc., 202 F.3d 129, 135 (2d Cir. 2000) (citations omitted). The trial court's atomized approach was wholly inconsistent with a legal standard that focuses on the "cumulative weight of circumstantial evidence." *Id.*

In this case, it can hardly be said that any of the Booking Agency Defendants' "proffered nondiscriminatory

reason[s]" for failing to provide the requisite notice and opportunity to contract on equal terms are "dispositive." *Id.* Certainly, their purported reliance on financial data (which has been shown to be after-acquired evidence), or their putative adherence to client instructions to select a particular promoter (which, as shown, have never been issued by any client with respect to any Plaintiff) do not "foreclose . . . any issue of material fact." *Id.*

Finally, even if Defendants' justifications were in some measure credible, but were accompanied by considerations based on race, summary judgment would be inappropriate under the clear law of this Circuit:

> the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors.

Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 123 (2d Cir. 2004) (quoting *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 78 (2d Cir. 2001)). Importantly, "[t]he plaintiff's burden in this regard may often be carried by reliance on the evidence comprising the prima facie case, without more." *Holtz*, 258 F.3d at 79; *Cronin*, 46 F.3d at 203 (same).

Here, while not legally necessary under the law of this Court, the Plaintiffs have in fact shown that the "proffered reasons were false or played no role in the . . . decision" not to provide Plaintiffs with the requisite notice and opportunity to contract on equal terms. Indeed, the patent falsity of one or more of the proffered justification—without more—would be reason-enough to support a jury's determination of discriminatory treatment in this case. Showing the employer's proffered

legitimate explanation for termination is not worthy of belief is:

> one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.

Windham v. Time Warner, Inc., 275 F.3d 179, 188 (2d Cir. 2001).

II.

THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS AGAINST THE PROMOTER DEFENDANTS UNDER 42 U.S.C. § 1981, AND AGAINST ALL DEFENDANTS UNDER § 1985(3)

The District Court likewise erred in dismissing the claims against the Promoter Defendants, Beaver and Jam. Material disputes of fact required denial of summary judgment.

A. Jones' Claim Against Beaver

The evidence adduced concerning the Mud Island incident supports claims by Plaintiff Jones against Beaver and the major Booking Agents under §§ 1981 and 1985.

1. The Court Improperly Weighed The Evidence

As set forth above, Plaintiff Jones and his partner Kelley obtained the exclusive rights from the City of Memphis to promote concerts at the Mud Island venue in

1992, and their deal was routinely extended by the City, at least up through 1997. When Kelley passed away in early 1998, the Memphis Park Commission again approved an extension, this time for Mr. Jones on his own, without a white partner. As demonstrated above, the Mayor orally approved as well and the papers were prepared for his signature.

Defendant Beaver, however, acting at the specific behest of "the top talent agencies in the country," took dramatic action to ensure that a black-owned promotion company did not come to promote a steady stream of white acts at a prominent Southern venue. (*See* A-761; A-815.) Its openly threatening letter to the City Park's Director—made on behalf of "all the top talent agencies"—clearly implied that no major acts would be directed to the City-owned venue unless Jones' black-owned promotion company were swiftly dumped.

And dump Jones they did. The Mayor's deposition testimony on this issue was unbelievable to the point of absurdity. He claims he neither saw nor was told of Beaver's letter but just happened to change his mind that very day about the wisdom of exclusive arrangements, after six years. Incredibly, the District Court—in dismissing Plaintiffs' claims—held that Plaintiffs' failed to adduce evidence sufficient to show that Beaver's letter *caused* the Mayor's about-face. Short of a polygraph, it is difficult to imagine what evidence might pass the District Court's test.[25]

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[25] The District Court erred in finding that the Mud Island facts do not support Plaintiffs' discrimination claim against the Promoter Defendants, because "Mr. Jones was denied the exclusive contract at Mud Island based only on the independent decision of the Mayor and that the Leff letter had no effect on that decision, either directly or indirectly." (SPA-100.) The correspondence demonstrates that Beaver Productions, in concert with a dominant Booking Agency Defendant, actively sought to prevent a black promoter from taking over a promi-

In addition, as set forth above, at the same time that it was scheming with Beaver to induce the City to deny Jones his promotional agreement, WMA added insult to injury by stripping Jones of an already contracted-for James Taylor concert that was set for Mud Island and, instead, directing that concert to Beaver for the very same night at another venue in Memphis. Here again, the District Court credited the rank hearsay declaration of WMA agent Sheldon Schultz, to the effect that a manager of Mr. Taylor somehow requested to change promoters after learning that Mr. Jones' white partner had died. (SPA-126.) The court's admission of this hearsay statement—which a jury in any event would be within its rights to disbelieve—is particularly striking in light of the court's repeated rulings that statements proffered by the Plaintiffs were inadmissible on hearsay grounds.

The District Court further—astoundingly—credited the testimony of Beaver executive Leff that "he wrote . . . without prompting by anyone . . . and that his statement about the top talent agencies requesting Beaver to open a Memphis office was misworded." (SPA-101.)

Surely, the Plaintiffs are entitled to ask a jury to credit the statement in Leff's letter that the major talent agencies were behind his interference, and that the Mayor's testimony was not credible. The District Court improperly took it upon itself to "weigh the evidence or resolve material factual disputes on summary judgment." *Liberty Lobby*, 477 U.S. at 255; *Dawson v. County of Westchester*, 373 F.3d at 272. These issues, at the very least, ought to be open to resolution by a jury.

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nent Memphis venue, and that facing this pressure, Mayor Herenton subsequently denied Mr. Jones the contract. These facts are sufficient to raise a dispute as to the reasons for Mayor Herenton's decision, and his creditability was an issue for the jury.

2. Plaintiff Jones' Claims Should Go To A Jury

Once it is accepted that an issue of fact exists as to whether Leff was writing on behalf of the booking agents and whether his letter caused the City to discontinue its relations with Jones, then it is clear that the District Court erred in granting defendants' motions with respect to Jones' claims.

a. Section 1981 Claims

It is well established "that a third party's interference with an individual's equal opportunity to enter into contracts or purchase property can support civil-rights claims under §§ 1981 and 1982." *Shaikh v. City of Chicago*, 341 F.3d 627, 630 (7th Cir. 2003) (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) ("The right to 'lease' is protected by § 1982 against the actions of third parties, as well as against the actions of the immediate lessor . . . . A narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by [the Act] . . . .") (citations omitted)).

Clearly, if Plaintiffs' version of the facts is credited, this matter is nothing if not an instance of "a third party's interference with an individual's equal opportunity to enter into contracts." The inference of racial motivation is well supported in this case, given that (a) Jones' qualifications are not in dispute, and (b) Beaver and its booking agency cohorts only pounced after Jones' white partner died, raising the specter that a black-owned promotion firm might be left to promote a steady stream of white acts at a prominent Memphis venue. In this connection, all of the other evidence concerning the Booking Agency Defendants is also relevant

here, as is the evidence that the Louisiana-based Beaver, in promoting 300 concerts a year for 20 years has worked with black promoters on only a handful of occasions. (A-649.)

Lastly, it can hardly be a valid defense to this § 1981 claim that Beaver acted in its own economic interest in interfering with Jones' equal opportunity to enter into contracts. (SPA-102.) The District Court held that:

> While [Beaver's] actions could be consistent with a racially motivated conspiracy to interfere with a contractual relationship, Beaver's hiring of one of Mr. Kelley's top employees to open a Memphis office was obviously in Beaver's economic interests. Beaver points out that Mr. Leff urged fewer restrictions on trade, not less, in furtherance of their economic interests. (Hrg. Tr. 10/17/03 at 83.) Accordingly, Plaintiffs have presented no evidence giving rise to an inference of racial motivation to sustain their claims under 42 U.S.C. §§ 1981 or 1985(3).

The District Court's ruling reflects a fundamental legal error. Under this Court's decisions, Plaintiff is required only to show that the defendant's "proffered reasons . . . were not the only reasons and that the prohibited factor was at least one of the motivating factors." *Back*, 365 F.3d at 123. Clearly, a jury could well conclude that Beaver's actions were animated by its own racial animus, its own avarice and a desire to capitalize on the discriminatory intent of the booking agents in thwarting a black-owned promoter from controlling a major Southern venue that books a steady flow of white acts.

b. Section 1985(3) Claims

Plaintiff Jones has also adduced sufficient evidence of conspiracy. The elements of a claim under § 1985 are: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, . . . ; (3) an act in furtherance of the conspiracy; (4) whereby a person is . . . deprived of any right of a citizen of the United States." *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993) (per curiam).

Here, the only question not addressed above is whether there existed a conspiracy among the defendants. Patently, Leff's letter, stating that he is acting on behalf of "all the top talent agencies," provides direct evidence of the agreement element. This claim too, therefore, ought to be submitted to a jury.

B. All Plaintiffs' Claims Against Promoter Defendants

In a more general vein, all Plaintiffs assert claims against both Beaver and Jam based on evidence that they maintain policies of refusing to promote white acts with a black promoter. It is undisputed that Jam produces upwards of 300 music concerts in the Chicago area alone each year, and Plaintiffs adduced evidence that Jam promoted up to 1,200 events nationwide in 2001 and 2002. (SPA-59.) According to Jam principal Mickelson, "I am pretty sure that we have copromoted every black show we have ever done with a black promoter." (*Id.*) Nonetheless, neither Mickelson not his partner, Arny Granat, could recall a single instance of co-promoting a white act with a black promoter.[26] (*See* SPA-59.)

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[26] At most, the record discloses one counterexample of a music concert co-promoted with a black promoter—Jam's alleged co-pro-

That Jam co-promotes all of its black acts with black promoters, and none of its white acts surely supports an inference of impermissible race-based triage on the part of the defendant. An African American promoter—including all of the Plaintiffs—cannot hope to compete on an even playing field for the numerous co-promotional opportunities that arise each year for white artists in Jam promotions.[27] The same goes for Beaver, who has promoted 200 concerts per year for over 20 years and yet —with one exception—appears never to have associated a black promoter in the promotion of a white act.[28] (SPA-103.) Clearly, the Defendants' practices implicate Section 1981's core proscription against racially animated contracting practices. *See Patterson*, 491 U.S. 164 at 170.

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motion with a promoter named Al Kennedy of a concert by the Average White Band. (*See* SPA-80.)

[27] Importantly, Plaintiffs do not claim that Jam or any other promoter is somehow obligated to contract out shows for co-promotion. Rather, where the promoter does look to engage a co-promoter—including for example, situations where the booking agent requires the engagement of a co-promoter, or where Jam is promoting outside of its home town—the assertion is that they must select and contract with co-promoters without regard to race.

[28] The exception is promoter Larry Bailey, who has been with the white artist Kenny G since his very first professional concert. (A-3087.)

III.

THE TRIAL COURT'S ORDER OF SUMMARY JUDGMENT ON PLAINTIFFS' ANTITRUST CLAIMS SHOULD BE REVERSED

A. The Trial Court Erroneously Applied The Rule Of Reason To Plaintiff's *Per Se* Territorial Allocation Claim

The trial court erred in granting defendants summary judgment on Plaintiffs' claim that Defendants committed a *per se* violation of Section 1 of the Sherman Act by engaging in an illegal conspiracy to allocate business among certain favored promoters along territorial lines. As the court recognized, the Amended Complaint alleges that the Promoter Defendants engaged in a conspiracy through which they are "designated specific territories and venues, allowing them great dominance and control in these areas, to the exclusion of plaintiffs and others," (A-129; SPA-30), and that the Booking Agency Defendants agreed to sign on the favored promoters to "promot[e] the defendant booking agents' top acts in the promoter defendant's assigned territory. . . ." (A-130-31; SPA-30.) The Amended Complaint further alleges that, as a result of this territorial market allocation scheme, Plaintiffs have been excluded from promoting live contemporary music concerts in those territories (A-126, A-129, A-130; SPA-25), and that this illegal scheme "eliminates competition among promoters and prevents concerts from being promoted at lower prices which would benefit the artists and public." (A-130-31; SPA-25.)

The trial court recognized that these allegations on their face state a claim that the Defendants had engaged

in *per se* violation of Section 1 of the Sherman Act, yet found as a matter of law that "Plaintiffs have presented no *evidence* of any refusal to deal, group boycott, or division of territory by the Defendants" warranting *per se* analysis of Plaintiffs' claims. (SPA-22.) Accordingly, rather than applying *per se* analysis, the trial court evaluated the case under the rule of reason. (*Id.*) Indeed, the trial court's extended analysis of Plaintiffs' antitrust claims is grounded in its entirety in the rule of reason. (*See* SPA-24-42.) The court's threshold decision not to apply *per se* analysis—based on its sweeping conclusion that the record was devoid of evidence supporting Plaintiffs' territorial allocation claim—was error, and its Order should be reversed on that basis.

1. Plaintiffs' Territorial Allocation Claim Requires Per Se Analysis and The Trial Court's Application, Instead, of the Rule of Reason Was Reversible Error

The Supreme Court has found that "[o]ne of the classic examples of a *per se* violation of § 1 [of the Sherman Act] is an agreement among competitors at the same level of the market structure to allocate territories in order to minimize competition." *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 608 (1972). Because such agreements are "naked restraints with no purpose except stifling of competition," they are *per se* violations of the Sherman Act. *Id.*, (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)). As shown above, Plaintiffs have alleged just such a *per se* conspiracy: the Promoter Defendants have conspired to allocate territories to minimize competition in the market for promotion of contemporary music concerts, and the Booking Agency Defendants have conspired among

themselves and with the Promoters to hire promoters in accordance with that territorial allocation. (A-123-30.)

The trial court, however, found that "this case cannot be treated as a *per se* violation of Sherman Act," because it found the record contained no evidence of such a conspiracy. (SPA-22.) In other words, rather than looking to the complaint to determine whether Plaintiff's allegations stated a *per se* or rule of reason violation, the trial court based its determination on a threshold examination of the evidence underlying Plaintiffs' conspiracy allegations. The court instead should have been guided by the complaint, which plainly alleged a *per se* violation. *See Topco,* 405 U.S. at 608-09; *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959) (finding the allegations of Plaintiff's complaint alleged a *per se* violation of Section 1 of the Sherman Act, Court reverses order of summary judgment and dismissal, and remands for trial under *per se* standard). Then, in assessing Defendants' summary judgment motion, the court should have examined whether there was sufficient record evidence supporting Plaintiffs' allegation of a *per se* violation of the Sherman Act to warrant a jury trial. *See Matsushita Elec. Ind. Co., Ltd. V. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986). Instead, the court reviewed the sufficiency of Plaintiffs' antitrust allegations only under the rule of reason standard. This was an error of law that requires reversal.

2. Plaintiffs Presented Sufficient Evidence of A Territorial Allocation Conspiracy To Warrant Per Se Treatment

Even assuming it were proper for the court to conduct a threshold inquiry into the sufficiency of Plaintiffs' conspiracy evidence to determine whether *per se* treatment of Plaintiffs' territorial allocation scheme was war-

ranted, the court erred in concluding that Plaintiffs presented "no evidence" of this conspiracy. (SPA-20.) The Court recognized that Second Circuit precedent prohibits summary judgment so long as "there is any evidence in the record that could reasonably support a jury's verdict for the non-moving party," and that, in determining whether such evidence exists, the court must draw all inferences in the non-movant's favor. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 286 (2d Cir. 2002); (SPA-20.) In the antitrust context, summary judgment should not be ordered where the Plaintiff presents evidence that "satisfactorily cast[s] doubt on inferences of independent action or proper conduct by defendants." *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs, Inc.*, 386 F.3d 485, 507 (2d Cir. 2004) (citations omitted). Yet the Court ignored record evidence supporting its conspiracy claim, and, in assessing other evidence, resolved all inferences in Defendants' favor.

First, the court ignored record evidence supporting Plaintiffs' claim of a territorial allocation conspiracy. For example, the Court made no reference at all to a handwritten memo by agent Carole Kinzel (who authored the "[Do] Not Divulge Guarantee re Black Promoters" note) from the files of CAA, which bears the heading "Territory," and lists within each of several territories the dominant concert promoters all of which are white (e.g., Jam Productions in Chicago, Illinois). (*See* A-5481.) This is a significant piece of evidence showing that, according to defendant CAA, the promotion market was divided by region, one or two promoters appear to have been dominant in each region, and those promoters did not operate in the other regions listed in the memo.[29]

[29] Cellar Door Productions is the only exception. According to the memo, Cellar Door operated in Michigan, Washington, D.C., and Virginia. (A-5481-82.)

Yet, with no mention of this document, the Court concluded there was "no evidence" supporting Plaintiffs' territorial allocation claim.

The Court likewise did not consider as evidence of a territorial division the Mud Island evidence discussed above. To recap, following the death of the dominant white promoter in Memphis, Mr. Kelley, and in response to the effort of the black-owned Summit Management to obtain an agreement to be the exclusive promoter of events at the Mud Island venue in Memphis, Defendant Beaver Productions was asked by various top booking agents to move into the Memphis market to replace Mr. Kelley as the dominant promoter at all venues in the area. (A-761; A-17608-64; A-815.) A principal of Beaver wrote at that time that "because of our relationship with [Mr. Kelley], we have always stayed out of [the Memphis] market." (A-761.) This is evidence from which a juror reasonably could infer that Mr. Kelley and Beaver had an argument to allocate the Memphis concert market, which supports Plaintiffs' territorial allocation claim. Certainly it is sufficient evidence to "cast doubt" on inferences of independent action by the defendants. *Geneva Pharmaceuticals Tech. Corp.*, 386 F.3d at 507. Yet the District Court did not consider this evidence in his review of Plaintiffs' antitrust claims, and, in connection with Plaintiffs' discrimination claims, declared it too "tenuous" to support an inference of discriminatory conduct. (SPA-155.)

Second, in assessing the adequacy of Plaintiffs' other evidence of a market allocation conspiracy, the court impermissibly resolved inferences arising from that evidence in defendants' favor. While recognizing that, to survive summary judgment, Plaintiffs merely must present evidence sufficient to "cast doubt" on any inference of permissible conduct by defendants (SPA-24), the

Court ultimately resolved all inferences raised by Plaintiffs' evidence in defendants' favor.

For example, in reviewing Plaintiffs' evidence of improper territorial allocation in the San Francisco area, the court evaluated a series of letters from Shelly Schulz of WMA to two representatives of Bill Graham Presents, a former Promoter Defendant which Plaintiffs allege was dominant in that region through the late 1990s, concerning Bill Graham's refusal to promote a Culture Club concert. (SPA-33-36.) The March 2, 1998 letter indicates that the company's refusal to promote the concert may lead WMA to use a different promoter, from outside of the Bay Area territory: "If the walls are down around the Bay area it's because you allowed that to happen . . . with your friends no less." (A-10985; SPA-34.)

Subsequently, a WMA representative wrote to a concert promoter from Los Angeles asking if he would like to promote the Culture Club concert in the Bay area, and stated: "I feel very strongly about opening up the San Francisco marketplace to other promoters." (A-10987; SPA-34.) The trial court found, as a matter of law, that these letters provided no evidence of an agreement among the Promoter Defendants or the Booking Agency Defendants. (SPA-35.) Fundamentally, this finding resulted from the court's resolution of all inferences raised by these letters in defendants' favor. But the Court's obligation was to determine whether this evidence "cast[s] doubt" on the inference that these defendants were acting independently. *Geneva Pharmaceuticals Tech. Corp.*, 386 F.3d at 507. One could infer from this correspondence that, in proposing to open the San Francisco market and bring "the walls . . . down" in that area, WMA was proposing to alter a pre-existing territorial allocation agreement among the Defendants. At a minimum, this casts doubt on the alternative inference that

the Defendants were engaging in independent conduct. Accordingly, the court's finding that Plaintiffs had presented "no evidence" supporting its allegations of a conspiracy to allocate territory was error.[30]

B. Viewed Under a *Per Se* Standard, Plaintiffs' Territorial Allocation Claim Must Be Permitted to Proceed to Trial

Because it incorrectly evaluated Plaintiffs' territorial allocation claim under the rule of reason, the trial court required Plaintiffs to demonstrate not only sufficient evidence that the alleged conspiracy existed, but also evidence of the relevant market, Defendants' dominance in that market, and resulting competitive injury. (SPA-24-42.) Under the *per se* standard, however, a restraint is conclusively presumed unreasonable "without elaborate inquiry as to the precise harm they have caused or the business excuse for [its] use." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 8 (1979) (*per se* conspiracies are "conclusively presumed illegal without further examination"); *Topco Assocs.*, 405 U.S. at 608 ("we think it is clear that restraint in this case is a horizontal one, and, therefore, a per se violation of § 1"); *Drury Inn-Colorado Springs v. Olive Co.*, 878 F.2d 340, 342-43 (10th Cir. 1989) (per se rule condemns conduct without proof of power, effect, or purpose and without hearing claims of legitimate objectives.")

Because Plaintiffs have alleged a territorial allocation conspiracy, and, as shown above, have presented sufficient evidence in support of that allegation for purposes

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[30] The District Court similarly resolved inferences in defendants' favor with respect to other record evidence of conspiracy. (A-5481-82.)

of summary judgment, defendants are not required to demonstrate that competitive injury resulted from the conspiracy—it is presumed. Beyond this, Plaintiffs must only demonstrate that they have standing to pursue a private Sherman Act claim—i.e. that they have suffered antitrust injury. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341-42 (1990); *Primetime 24 Joint Venture v. Nat'l Broadcasting Co., Inc.*, 219 F.3d 92, 103 (2d Cir. 2000). Plaintiffs must simply show that they have suffered injury, and that competition generally has been injured, as a result of defendants' conduct. *See Primetime 24 Joint Venture*, 219 F.2d at 103. Here, Plaintiffs have satisfied this burden at the summary judgment stage. As shown above in the Statement of Facts, Plaintiffs have sufficiently established that they compete with the other promoters for concert promotion business in the territories that have been allocated,[31] and that they have been prevented from competing for business by defendants' conspiracy, to their detriment and that of competition as a whole. This was sufficient proof of antitrust injury.

Had the court properly applied the *per se* standard, it would have been bound to deny Defendants' summary judgment motion on Plaintiffs' territorial allocation claim. For this reason as well, the trial court's order should be reversed.

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[31] Here again, the District Court held plaintiffs to too high a standard, improperly requiring them, for example, to prove what the relevant market is for purposes of antitrust injury analysis. (SPA 24-25.) No such proof is required at this stage. *See Hayden Publ. Co., Inc. v. Cox Broadcasting Corp.*, 730 F.2d 64, 68 (although plaintiff must prove the relevant product market at trial, "it did not have that burden for purposes of the defendants' motion for summary judgment."

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the judgments below.

Dated: New York, New York
May 27, 2005

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B)(i).

1. Exclusive of the exemption portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii), this brief includes 21,000 words.

2. This brief has been prepared in Microsoft Word 97 in 14 point font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count of this word-processing system in preparing this certificate.

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Dated: May 27, 2005

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Beaver Productions, Inc. hereby states that Beaver Productions, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE CASE

Plaintiffs-Appellants instituted this action on November 19, *1998. Joint Appendix, Volume I* of *XXIX, at A-18.* Defendant-Appellee Beaver Productions, Inc., along with several other defendants, successfully moved to dismiss Plaintiffs-Appellants' original *Complaint* in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6). *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, No. 98 Civ. 8272, 1999 WL 335139 at *9 (S.D.N.Y. May 26, 1999). Plaintiffs Appellants filed an *Amended Complaint* which survived Defendant-Appellee Beaver Productions, Inc.'s motion to dismiss on Federal Rule of Civil Procedure 12(b)(6) grounds. *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, No. 98 Civ. 8272, 2000 WL 896929 at *15 (S.D.N.Y. July 6, 2000).

Subsequently, three years of discovery commenced, at the end of which Defendant-Appellee Beaver Productions, Inc., as well as four other Defendants-Appellees remaining in the action, successfully moved for summary judgment. *Special Appendix at SPA1-174; Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, No. 98 Civ. 8272, 2005 WL 22833 at *87 (S.D.N.Y. Jan. 5, 2005). In his detailed and studied *Order and Opinion,* Judge Patterson summed up his comprehensive analysis of the evidence Plaintiffs-Appellants submitted as follows: **"The Court concludes, after weighing all the evidence in this case and drawing all inferences in favor of the Plaintiffs, that Plaintiffs have raised no genuine issue of material fact and that no rational trier of fact could find for Plaintiffs on any of the myriad of claims made in this action."** *Special Appendix at SPAJ 73; Rowe Entertainment, Inc.*, 2005 WL 22833 at *87 (emphasis added). It is from the Dis-

trict Court's granting of Defendants-Appellees' motions for summary judgment that this appeal follows.

STATEMENT OF THE FACTS

On April 20, 1998, Barry Leff, vice president of Defendant-Appellee Beaver Productions, Inc., sent a letter to Wayne Boyer, Director of Parks Commission for the City of Memphis (the "Leff letter"). *Joint Appendix, Volume I XXIX at A-664.35.* The main thrust of the Leff letter was to request that the Parks Commission not enter into an exclusive agreement with respect to the Mud Island Ampitheather. Based upon the uncontroverted evidence, the Leff letter had no effect on whether Plaintiff-Appellant Jones received an exclusive contract for the Mud Island Ampitheather.

With respect to contracts for the City of Memphis, in 1998 Dr. Willie W. Herenton, Mayor of Memphis, was the sole contracting authority for that municipality. *Id. at A-664.44.* Mayor Herenton is African-American. Mayor Herenton testified that the Leff letter had no impact whatsoever on his decision not to grant Plaintiff-Appellant Jones an exclusive contract for the Mud Island Ampitheather. *Id. at A-664.48 (p. 46).* On the date of his deposition, October 15, 2001 *(id. at A-664.43),* Mayor Herenton testified that this was the first time he had seen the Leff letter. *Id. at A-664.47 (p. 40).* He explained that the reason for his deciding not to sign any exclusive agreement for the Mud Island Ampitheater was based upon his two bad experiences with exclusive, multi-year agreements. *Id. at A-664.45-46 (pp. 29-30).* Thus, the Leff letter had no effect on whether Plaintiff-Appellant Jones received an exclusive contract for the Mud Island Ampitheather.

Likewise, The William Morris Agency, Inc.'s intention to use Bob Kelley, president of Mid-South Concerts, for a James Taylor concert *(Joint Appendix, Volume XXVI of XXIX, at A-17841)* was not in any way related to W. Kelley's and Plaintiff-Appellant Jones' Island Events partnership. The letter from Shelly Schultz of The William Morris Agency, Inc., addressed to Mr. Kelley and referencing possible dates for the James Taylor concert, is dated March 3, 1998. *Id.* W. Kelley committed suicide on March 27, 1998. In Shelly Schultz's subsequent letter to Ms. Susan Green, who was the Vice President of Mid-South Concerts, dated April 17, 1998, Shelly Schultz confirms the new date and new facility for the James Taylor concert. *Id. at A-17843.*

The uncontroverted evidence establishes that there was no connection between the Leff letter, Mayor Herenton's decision not to grant Plaintiff-Appellant Jones an exclusive agreement for the Mud Island Ampitheater, and the James Taylor concert moving from the Mud Island Ampitheater to the Mid-South Coliseum. While Mr. Leff did write in the letter that the top talent agencies asked Defendant-Appellee Beaver Productions, Inc. to establish an office in Memphis, such puffery is no different than Plaintiff-Appellant Jones' statement within his several faxes dated April 20, 1998, and April 21, 1998, that he had entered into an exclusive contract with the City of Memphis to book the Mud Island Ampitheater. *Joint Appendix, Volume XI of XXIX, at A-7307-14, 16-20.* Even though both statements may have sounded good, and lent their writers a certain measure of authority and credibility, the simple fact is neither statement was true.

SUMMARY OF THE ARGUMENT

In opposing Defendant-Appellee Beaver Productions, Inc.'s motion for summary judgment, Plaintiffs-Appellants failed to present the District Court with evidence that established their *prima facie* case, much less a genuine issue of material fact, on their alleged claims of violations of 42 U.S.C. §§ 1981, 1985(3), and 1986, and 15 U.S.C. § 1. As a result, Judge Patterson concluded that "no rational trier of fact could find for Plaintiffs on any of the myriad of claims made in this action." *Special Appendix at SPA-173.* Despite Plaintiffs-Appellants' assertions to the contrary within the *Brief for Plaintiffs-Appellants,* Judge Patterson did not weigh the credibility of testimonial and documentary evidence, nor did he . resolve disputed inferences in Defendants-Appellees' favor. *Brief for Plaints-Appellants at 35.* Judge Patterson correctly assessed the evidence, or more accurately the lack thereof, found no genuine issue of material fact on any of Plaintiffs-Appellants causes of action, and correctly granted Defendant-Appellee Beaver Productions, Inc.'s motion for summary judgment.

ARGUMENT

I. STANDARD OF REVIEW

The Second Circuit Court of Appeals reviews a district court's grant of summary judgment *de novo. Pepsico, Inc. v. Coca-Cola Company,* 315 F.3d 101, 104 (2d Cir. 2002). Summary judgment is appropriate only where the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* The evidence must be

examined in the light most favorable to the moving party. *Id.*

In the context of antitrust cases, however, summary judgment is particularly favored because of the concern that protracted litigation will chill pro-competitive market forces. *Id.* Although all reasonable inferences will be drawn in favor of the non-movant, those inferences must be reasonable in light of competing inferences of acceptable conduct. *Id. at 105.*

II. PLAINTIFFS-APPELLANTS FAILED TO PRESENT THE TRIAL COURT WITH SUFFICIENT EVIDENCE OF THEIR ALLEGED CLAIMS OF VIOLATIONS OF 42 U.S.C. §§ 1981 and 1985(3)

A. ELEMENTS OF 42 U.S.C. §§ 1981 AND 1985(3) CLAIMS

1. 42 U.S.C. § 1981

To establish a claim under 42 U.S.C. § 1981, a plaintiff must allege facts in support of the following elements: (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute (*i.e.*, make and enforce contracts, sue and be sued, give evidence, *etc.*). *Mian v. Donaldson, Lufkin & Jenrette Securities Corporation*, 7 F.3d 1085, 1087 (2d Cir. 1993).

An essential element to a cause of action under 42 U.S.C. § 1981 is a requirement that the alleged discrimination took place because of the individual's race. *Id.* at 1088. The plaintiff must show that race was one of the motivating factors for the defendant's actions. *Cho v. Itco, Inc.*, 782 F. *Supp.* 1186, 1187 (E.D. Tex. 1992).

2. 42 U.S.C. § 1985(3)

The four elements of a 42 U.S.C. § 1985(3) claim are: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of person of equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of a citizen of the United States. *Mian,* 7 F.3d at 1087.

Furthermore, the conspiracy must also be motivated by some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action. *Id.* at 1088; *Johnson v. Harron*, No. 91-CV-1460, 1995 WL 319943 at *26 *(N.D.N.Y.* 1995); *Taliaferro v. Voth*, 774 F. Supp. 1326, 1332 (Kan. 1991).

B. THE UNDISPUTED FACTS ESTABLISH NO RACIAL MOTIVATION BEHIND THE LEFF LETTER, NOR MAYOR HERENTON HAVING ANY KNOWLEDGE OF THE LEFF LETTER

Plaintiffs-Appellants assert that the District Court erred in dismissing their 42 U.S.C. §§ 1981 and 1985(3) claims against Defendant-Appellee Beaver Productions, Inc. *Brief for Plaintiffs-Appellants at 67.* Plaintiff-Appellant Jones states that the "evidence adduced concerning the Mud Island incident supports claims by Plaintiff Jones against Beaver and the major Booking Agents under §§ 1981 and 1985." *Brief for Plaints-Appellants at 68.* The lynchpin of Plaintiff-Appellant Jones' argument is the Leff letter, dated April 20, 1998, addressed to Wayne Boyer, Director of the Memphis Parks Commission. *Joint Appendix, Volume I* of *XXIX, at A-664.35.* Within that letter, Mr. Leff requests that the

City of Memphis keep the Mud Island Ampitheather open to all promoters. *Id.* Not once does he mention Plaintiff-Appellant Jones. He goes on to explain that Defendant-Appellee Beaver Productions, Inc. is opening an office in Memphis, and hiring the former Vice President of Mid-South Concerts, Ms. Susan Green. *Id.* The former President of Mid-South Concerts, the late W. Bob Kelley, committed suicide on March 27, 1998.

The District Court found that the evidence presented by Plaintiffs-Appellants established neither Mr. Leff nor Mr. Don Fox (president of Defendant-Appellee Beaver Productions, Inc.) knew that Plaintiff-Appellant Jones was black. *Special Appendix at SPA-100.* Plaintiff-Appellant Jones did not offer contradictory testimony on the issue of whether W. Leff or W. Fox knew he was black. *Id.* Obviously, there can be no racial motivation if the only record evidence is that Mr. Leff and Mr. Fox of Defendant-Appellee Beaver Productions, Inc. had no knowledge of Plaintiff-Appellant Jones' race. Thus, the District Court correctly concluded that Plaintiffs-Appellants presented no evidence giving rise to an inference of racial motivation to sustain their claims under 42 U.S.C. §§ 1981 and 1985(3). *Id. at SPA-102.*

Further, the District Court found the undisputed evidence established the following facts concerning the Leff letter:

1. Mayor Herenton, the black mayor of Memphis, was not aware of the Leff letter to Wayne Boyer at the time Mayor Herenton decided not to approve an exclusive agreement for the Mud Island Ampitheater with Summit Management Corporation, Plaintiff-Appellant Jones' promotion company *(Special Appendix at SPA-99; Joint Appendix, Volume I of XXIX, at A-664.47 (p. 40));*

2. Mayor Herenton had no recollection of any communications with W. Boyer or Mr. Malmo regarding Beaver *(Special Appendix at SPA-100);* and

3. Mayor Herenton testified that the Leff letter had nothing to do with his decision to not grant the exclusive agreement, but rather he thought it was in the best interest of the city of Memphis, and the Mud Island Ampitheater, that it be left open to participation to a variety of promoters *(Special Appendix at SPA-100; Joint Appendix, Volume I of XXIX, at A-664.8 (p. 46)).*

The only evidence produced to the District Court established that the Leff letter was not even known to Mayor Herenton at the time he made his decision not to grant and exclusive contract to Plaintiff-Appellant Jones. Thus, the District Court correctly concluded:

> [T]he uncontradicted direct evidence is that Mr. Jones was denied the exclusive contract at Mud Island based only on the independent decision of the Mayor and that the Leff letter had no effect on that decision, either directly or indirectly. Thus, the Plaintiffs have not shown that Beaver's actions involving Mud Island injured Mr. Jones or any of the Plaintiffs or interfered with a potential contractual relationship in violation of 42 U.S.C. § 1981.

Special Appendix at SPA-100.

The undisputed record evidence establishes that the Leff letter had no effect on Mayor Herenton's decision not to grant exclusive contract for the Mud Island Ampitheater, and that W. Leff and W. Fox were unaware of Plaintiff-Appellant Jones' race. The District Court committed no error in granting Defendant-Appellee Beaver Productions, Inc.'s motion for summary judgment requesting dismissal of Plaintiffs-Appellants' causes of

action alleging violations of 42 U.S.C. §§ 1981 and 1985(3).

C. NO ACTION LIES UNDER 42 U.S.C. § 1986 WITHOUT A VIOLATION OF 42 U.S.C. § 1985(3)

42 U.S.C. § 1986 provides a cause of action against anyone who, having knowledge that any of the wrongs conspired to be done and mentioned in 42 U.S.C. § 1985 are about to be committed and having power to prevent or aid, neglects to do *so. Mian,* 7 F.3d at 1088. Without the prerequisite violation of 42 U.S.C. § 1985, Plaintiffs-Appellants have no cause of action under 42 U.S.C. § 1986.

III. PLAINTIFFS-APPELLANTS HAVE FAILED TO PROVIDE EVIDENCE THAT ESTABLISHES THEIR STANDING TO CLAIM A VIOLATION OF 15 U.S.C. § 1

Antitrust laws are designed to protect competition, not competitors; what must be demonstrated by plaintiffs, even on a motion for summary judgment, is not merely injury to them proximately resulting from the conduct of the defendants, but that their injury had an anti-competitive effect on the market. *Invictus Records, Inc. v. American Broad. Cos., Inc.*, 98 F.RD. 419, 433 (ED. Mich. 1982).

Judge Patterson found that Plaintiffs-Appellants "have presented no evidence of any refusal to deal, group boycott, or division of territory by the Defendants." *Special Appendix at SPA-22.* Thus, he correctly dismissed any finding of a *per se* violation of section 1 of the Sherman Act, and chose to evaluate this case under the rule of reason.

Only unreasonable restraints of trade violate 15 U.S.C. § 1. *Clorox Co. v. Winthrop*, 836 F. Supp. 983, 988 *(E.D.N.Y. 1993). Per se* illegal restraints are agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused of the business excuse for their use; examples of *per se* violations include horizontal and vertical price-fixing, division of a market into territories, certain tying arrangements, and certain group boycotts involving concerted refusals to deal with a competitor. *Id.* at 989; *Love v. Basque Cariel*, 873 F. Supp. 563, 576 (Wyo. 1995).

Under the rule of reason, a plaintiff bears the initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice; this rule reflects the principle that antitrust laws exist for the protection of competition, not competitors. *Clorox Co.,* 836 F. Supp. at 989.

Plaintiffs-Appellants failed to produce any evidence to support their Section 1 claim. Such a claim requires a showing of injury to competition in the relevant market. *Pepsico, Inc. v. Coca-Cola Company,* 315 F.3d 101, 111 (2d Cir. 2002). Much like the district court in the *Pepsico, Inc.* case, here the District Court found that Plaintiffs-Appellants failed to offer any evidence "to show that the alleged relevant product market for contemporary music concerts promotions in venues with 3,000 or more seats is not reasonably interchangeable with concerts conducted in smaller venues. Thus, Plaintiffs have not provided any evidence to support their relevant market definition." *Special Appendix at SPA-26.*

The District Court also found, after granting Plaintiffs-Appellants the assumption that there is a distinct market for contemporary concert promotions in the United States in venues with 3,000 or more seats, that Plaintiffs-Appellants failed to produce any evidence to support their allegation that the Defendants-Appellees have control and power over that market. *Special Appendix at SPA-26.*

The undisputed record evidence establishes that Plaintiffs-Appellants failed to provide any evidence on the issue of the relevant market, and thus Plaintiffs-Appellants failed to establish antitrust standing. The District Court committed no error in granting Defendant-Appellee Beaver Productions, Inc.'s motion for summary judgment requesting dismissal of Plaintiffs-Appellants' cause of action alleging a violation of 15 U.S.C. § 1.

IV. PLAINTIFFS-APPELLANTS HAVE WAIVED ANY ISSUE OR ARGUMENT ON APPEAL THAT IS NOT DELINEATED WITH SPECIFICITY

A party waives any arguments or issues that are not raised on appeal. *See Wills v. Amerada Hess Corp.*, 379 F.3d 32, 52 (2d Cir. 2004); *LoSacco v. City of Middletown,* 71 F.3d 88, 92-93 (2d Cir. 1995); Fed. R. App. P. 28(a)(9) (requiring that the appellant's brief must contain the appellant's contentions and the reasons for them). As Plaintiff-Appellant Jones was the only one of the eight Plaintiffs-Appellants to raise the Mud Island Ampitheater issue, Defendant-Appellee Beaver Productions, Inc. respectfully asserts that all other Plaintiffs-Appellants have waived this issue.

Additionally, Defendant-Appellee Beaver Productions, Inc. respectfully asserts that all Plaintiffs-Appellants have waived any issues on appeal that are not delineated

with specificity with the *Brief on Behalf of Plaintiffs-Appellants.* While the *Brief for Plaintiffs-Appellants* addresses Defendant-Appellee Beaver Productions, Inc.'s involvement in a conspiracy generally, it fails to state with any specificity the facts which support any of the elements under Plaintiffs-Appellants several causes of action. As such, the case law of the Second Circuit mandates that Plaintiffs-Appellants waived all issues on this appeal, except for Plaintiff-Appellant Jones' claim relative to the Mud Island Ampitheater.

CONCLUSION

There is nothing "pilling" about the District Court's decision in this case. The *Opinion and Order* issued by Judge Patterson *(Special Appendix at SPA-1-174)* fully addressed each and every overt act and cause of action alleged by Plaintiffs-Appellants against Defendant-Appellee Beaver Productions, Inc., as well as the other four Defendants-Appellees included in this appeal. The *Opinion and Order* repeatedly illustrated Plaintiffs-Appellants' failure to produce evidence that established the basic elements of each of their causes of action, much less conflicting evidence which created a genuine issue of material fact. Plaintiffs-Appellants have failed to establish their *prima facie* case for each of their causes of action.

Defendant-Appellee Beaver Productions, Inc. respectfully requests that this Honorable Court affirm the District Court's *Judgment* granting dismissal with prejudice of Plaintiffs-Appellants' *Amended Complaint* as to Defendant-Appellee Beaver Productions, Inc.

Respectfully submitted on June 27, 2005.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of compliance with type-volume limitation, typeface requirments, and type style requirements:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,106 words, inclusive of the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft® Word 2002 in 14 point Times New Roman font.

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05-0854-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROWE ENTERTAINMENT, INC., ET AL.,

Plaintiffs-Appellants,

—v.—

THE WILLIAM MORRIS AGENCY, INC., ET AL.,

Defendants-Appellees.

On Appeal From the United States District Court
for the Southern District of New York

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RULE 26.1 CORPORATE DISCLOSURE

Pursuant to Rule 26.1 and to enable Judges of the Court to evaluate possible disqualification or recusal, the undersigned counsel of record for a private (non-governmental) party certifies that Creative Artists Agency, LLC has no other corporate or other parents, subsidiaries, or affiliates that are publicly held.

The William Morris Agency, Inc. is a privately held company with no publicly held parents, subsidiaries, or affiliates.

Renaissance does not have a corporate parent and no publicly held corporation owns 10% or more of its stock.

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STATEMENT REGARDING ORAL ARGUMENT

Because of the extensive record in this case, the many claims raised by the plaintiffs, and the length of the district court's opinion, appellees believe that oral argument may assist the court in identifying the important legal issues and answering specific questions about the record. Accordingly, appellees agree with appellants that oral argument is appropriate.

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PRELIMINARY STATEMENT

The district court correctly granted summary judgment as a result of plaintiffs' complete failure of proof. After publicly making scathing accusations of a thirty-year long, industry-wide conspiracy to discriminate on the basis of race in the concert-promotion business, and after being given access to virtually unlimited document and deposition discovery over several years from defendants and third parties, plaintiffs failed to produce any probative evidence to support their fantastic conspiracy and discrimation claims. The evidence overwhelmingly demonstrated that plaintiffs' substantive allegations were false.

As the undisputed evidence established, plaintiffs never achieved success in the concert-promotion business, not because of race discrimination or any conspiracy, but because they lacked the ability, resources, and track record of hard work necessary to develop the relationships, to compete with successful concert promoters—both black and white. Indeed, plaintiffs failed to meet their burden to come forward with any probative evidence to support their claims that they have been the victims of unlawful discrimination by the booking-agency defendants.

Plaintiffs survived a motion to dismiss their amended complaint primarily because they amended the complaint to include false allegations that no black concert promoter had ever promoted a white musical act. The plaintiffs also falsely alleged that they were highly capable and experienced concert promoters who accounted for most of the business done by black promoters; that the booking agencies, not the artists and their managers, decided which promoters to use; and that plaintiffs repeatedly had been discriminated against in bidding for

major black and white acts as a result of a grand conspiracy. Based on these accusations, the district court permitted plaintiffs to conduct exhaustive discovery over a nearly three-year period.

At summary judgment, plaintiffs indiscriminately tossed up numerous allegations against defendants, perhaps hoping that the district court would shrink from the task of analyzing the evidentiary support (or lack thereof) for each allegation. Responding to plaintiffs' scattershot approach understandably took considerable space (a 175-page opinion), but the district court painstakingly evaluated every piece of evidence plaintiffs offered and found that none of it—taken separately or together—raised a genuine issue of material fact in support of plaintiffs' claims.

To the contrary, the evidence demonstrated that the booking-agency defendants did business with successful black promoters who promoted both white and black artists; that plaintiffs' failure to get business was attributable to their own lack of resources, reputation, and failure to bid; that it was the artists and their managers, not the booking-agency defendants, who ultimately decided which promoters to use; and that there was no evidence of a conspiracy or discriminatory intent by the defendants. The district court's decision was entirely correct, and this Court should affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. INTRODUCTION

Plaintiffs are four concert-promotion companies and their African-American owners: Rowe Entertainment, Inc., Leonard Rowe, Sun Song Productions, Inc., Jesse

Boseman, Summitt Management Corporation, Fred Jones, Jr., Lee King Productions, Inc., and Lee King. The defendants are three talent agencies, WMA, CAA, and Renaissance—whose business includes booking contemporary—music concert engagements and tours for their respective artist clients,[1] and two concert promoters (Jam Productions, Ltd. and Beaver Productions, Inc.).

Plaintiffs filed this action in November 1998, alleging the existence of a decades-old, industry-wide, racially motivated and anticompetitive conspiracy among the defendants to exclude plaintiffs and other black promoters from promoting contemporary-music concerts of white and major black artists in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and of the Civil Rights Act of 1866 and 1991, 42 U.S.C. §§ 1981, 1985(3), and 1986.

The district court in its Opinion and Order, SPA. 1-174, set forth the material facts it found to be undisputed, based in part on plaintiffs' admissions in response to the booking-agency defendants' joint and individual rule 56.1 statements of undisputed material facts,[2] and the district court held other facts to be admitted because of plaintiffs' nonresponsive submissions.[3] The district

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[1] Originally, the defendants included many other booking agencies and promoters. Those other defendants were dismissed pursuant to stipulated orders of dismissal. SPA.3.

[2] *See* A.17524-77, 17476-91, 17492-512, 17513-23.

[3] Additionally, in response to the booking-agency defendants' motions to strike plaintiffs' amended rule 56.1 statements, as well as plaintiffs' affidavits, A.17159-67, 17587-600, the district court struck those "portions of the Plaintiffs' Rule 56.1 Statements and supporting affidavits that constitute[d] argument and conclusory statements not shown to be made on an affiant's personal knowledge." SPA.1-2 n.1. On appeal, plaintiffs have not challenged the district court's findings and rulings on those two motions to strike.

court also found that plaintiffs' submission opposing the summary-judgment motions contained "numerous misrepresentations of testimony or half truths," SPA.2 n.2, and "false and misleading" characterizations of record evidence, SPA.47; *see also* SPA.17 n.36, 49 n.71, 69, 140. Plaintiffs repeat many of these misrepresentations and unsupported assertions in their appellate brief.

II. The Structure and Operation of the Concert-Promotion Business

A. The Differing Roles Played by Managers, Agents, and Concert Promoters

Artists typically require a booking agent's services to assist in booking concert engagements or tours. SPA. 11. The booking agent serves as the agent for its disclosed principal—the artist. SPA.37 n.58. An artist's manager typically oversees all aspects of the artist's career, acting essentially as the artist's alter ego. A.2679; SPA-11. Representatives of the artist, including the artist's booking agent, "take their directions from the manager, who speaks on behalf of the artist." *Id.*

When contemplating a tour, the artist or manager generally first establishes parameters for the proposed tour, including the number of concert dates, the time period, and the artist's preference for locale, venue location, and promoter. SPA. 11; A. 1499. The booking agent then collects offers received from concert promoters and presents them to the artist or manager for consideration and final approval. SPA. 11. The booking agent's duty and primary objective is to maximize the artist's profit by obtaining the best possible deals for their concert engagements. A.1373, 1499.

To promote a concert, a promoter must contract with the artist and with the building venue where the concert

will take place, as well as others. SPA. 11. The promoter bears the financial risk for the concert's success or failure and is responsible for all financial obligations of the concert, including the artists' guarantees, venue deposits, production costs, and advertising. SPA. 11-12; A.2677. A promoter may acquire the exclusive rights to promote an artist's entire tour or simply bid for individual tour dates. SPA.12-13.

The so-called "lead" concert promoter may retain the services of a copromoter to help promote a particular concert. SPA. 12. The lead promoter also may hire street promoters or consultants and pay them a fixed fee to help market the concert by distributing posters and flyers in local markets. *Id.* Street promoters do not share the financial risks of the concert, *id.*, and generally have no direct contact with the booking agent or the artist. A. 17552.

B. The Bidding Process

A promoter interested in promoting a particular artist must first bid. SPA. 14 ("To obtain an act, a promoter must first make an offer."). As successful black promoter Al Haymon testified, there is "no barrier to submitting an offer . . . in our business." SPA.16 n.29. In order to bid, "you don't have to have anything other than a telephone and a fax machine." *Id.* To ensure involvement in the process, concert promoters must "keep a line of communication [open] with the agencies" in order to know which artists are planning to tour. SPA. 14. But, booking agencies "are not the only sources of information about artists' plans to go on concert tours." *Id.* As plaintiff King testified, promoters use a "variety of different sources" to learn about upcoming concert tours, including rumor, Internet websites, television, periodicals, and

contacts with other promoters, record companies, and radio executives. A.4112-13; SPA.14.

A promoter must be "proactive and assertive" in seeking out business and "cannot wait for agents to contact them." SPA.15. Promoters "must call the booking agent to express that interest and to inquire about specific dates, and the artist's availability to perform in certain areas." SPA. 14. The names and addresses of artists' managers are publicly available in numerous trade directories. SPA.129. Successful black concert promoters who were not plaintiffs in this action repeatedly affirmed that they proactively seek concert opportunities, "not only by calling agents, but also by calling the artists' recording studios and managers." SPA.15.

Although a promoter may initially discuss the terms of a bid with the booking agent over the telephone, "the bid must eventually be in writing." SPA. 16. A bid must contain the amount of the guarantee, the artist-promoter split, and other information needed "for the artist or manager to assess the relative value of the bid." *Id.* Such information typically includes production costs, rent for the venue, participation in any ancillary revenue, and projected costs for stagehands, rigging, limousines, catering, and advertising. *Id.* Without that financial information, the manager or artist is "not . . . able to assess the offer." *Id.* Once the booking agent receives a written bid from a promoter, the agent forwards the bid to the artist or the artist's manager for consideration. SPA.17; *see also* A.1374, 1388-89, 1510.[4]

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[4] The district court found that not even a shred of evidence supported plaintiffs' conclusory assertion that the booking-agency defendants "withhold" from their clients bids from black promoters. For example, the district court found that "all bids are referred [by WMA agents] to the artists' management or the artist for their consideration." SPA.129; *see also, e.g.*, A.1388 (CAA's policy is to forward all bids unless instructed otherwise by the artist).

C. Business Relationships in the Concert-Promotion Industry

Concert promotion is "built on relationships that develop over time among artists, managers, promoters, agents, vendors and radio stations." SPA-10; A.17526. Promoters "often select co-promoters based on previous relationships," SPA.12; A.17524, and artists select promoters on the same basis. As Haymon testified, good relationships are crucial to succeed in the concert-promotion business:

> If an artist is someone that I have a relationship with, it is possible for me to maintain that relationship over a period of time, as opposed to just during the course of a touring cycle . . . . [I]f you can keep the relationship then perhaps you can survive what is somewhat a revolving door of representation for that artist.

A.3625; *see also* A.17526-27.

The unsupported assertions repeated in plaintiffs' brief, Rowe Br. 4, 6, claiming that the booking-agency defendants solicited bids "only from a 'good old boys network' " or a "fraternity" of white concert promotion firms, were exposed on summary judgment as unsubstantiated fabrications[5] that mischaracterized the evidence.[6] SPA. 127-29, 155-59.

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[5] WMA's electronic database of concerts in the period 1995 to 2001 showed that less than 10% of WMA's work for its clients was conducted with the concert-promoter defendants initially named in this action. SPA. 128-29; A.1500, 1502. In fact, defendants' expert demonstrated without contradiction that the booking-agency defendants collectively directed more than 60% of their business to non-defendant promoters. A.2828, 2846.

[6] As the district court found, although some defendants had "done business together for years," such "longstanding relationships

D. Artists and Their Managers—Not Booking Agents—Select Concert Promoters.

Plaintiffs premised their complaint on the assertion that the booking-agency defendants controlled the promoter-selection decision, A. 104, but the undisputed evidence demonstrated otherwise. As the record showed, a combination of individuals (*e.g.*, the artist, manager, booking agent, lawyer, and the artist's family members) play a role in the selection of concert promoters, with the artist and manager retaining the ultimate authority to select the concert promoters. SPA. 17; *see also* A. 17535-37. Evidence from third-party booking agents, artists' managers, and concert promoters demonstrated conclusively that artists generally rely on their managers to choose promoters. SPA. 17 n.36. When selecting a concert promoter, artists and their managers consider many factors, including the promoter's "(a) experience with a genre of music; (b) relationship with the artist; (c) relationship with the manager; (d) financial wherewithal; (e) relationships within a particular market or region; (f) reputation; (g) production infrastructure; and (h) relationship with the agency." SPA. 18; *see also* A.2682. None of those legitimate and neutral business considerations are driven by or bear *any* relationship to race or discrimination.

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just as successfully exclude other white promoters." SPA.132. Plaintiffs' attempt to attach a charged, quasi-racist "old boys network" label to describe normal, lawful business relationships fails precisely for the reasons cited by the district court.

E. Plaintiffs Failed to Create and Maintain Meaningful Industry Relationships, to Bid for Concerts, or to Establish Track Records as Experienced and Financially Sound Promoters.

The district court found that plaintiffs had failed to present evidence substantiating their conclusory allegation that racial animus, as opposed to other factors, was responsible for plaintiffs' failure to establish themselves as successful concert promoters or to be selected to promote concerts, either large or small. *See e.g.,* SPA. 107-73.

1. Plaintiffs Lacked Experience, Financial Stability, and Business Relationships With the Booking-Agency Defendants.

Plaintiffs premised their, action on claims that they were "skilled, experienced, and financially sound concert promoters" who were "regularly retained" by the booking-agency defendants to promote concerts "throughout the United States" in the "largest and most important" venues A.105. They also claimed that "[d]uring the last several years, [they] have accounted for most of the business done by black concert promoters within the United States." A.104. The district court found those allegations to be "false and misleading" because they were belied by the undisputed evidence. SPA.47.

a) Leonard Rowe, Rowe Entertainment: Rowe Entertainment is an Atlanta-based company incorporated in 1998. It employs one employee, a secretary, other than its president and sole shareholder, Leonard Rowe. SPA.48. Rowe's personal and financial background is a matter of public record. Rowe filed for personal bankruptcy in 1984 and has had several lawsuits and seven

tax liens filed against him. SPA.50. Rowe pleaded guilty to passing a bad check in 1986, was ordered to serve a three-year probation, and was sentenced to six months in state prison in 1987 for violating the terms of his probation. SPA.50-51. Thereafter, Rowe was convicted of wire fraud for cashing a fraudulent insurance check and was sentenced to five years in federal prison. *Id.* Imprisoned from October 1990 to April 1992, Rowe also has been arrested on other occasions for writing bad checks. SPA.51.

Rowe failed to show that he has made any recent efforts to promote concerts. Rowe could not recall having submitted any written offers to promote concerts between 1988 and 1998 and has *never* submitted a written bid to promote a white artist. SPA.48-49. The only national tour Rowe ever promoted (the Jacksons) was in 1979. During that tour, Rowe stopped payment on a $150,000 check to the Jacksons; he was never asked to promote for them again. SPA.50.[7] Perhaps most telling, Rowe has not acted as lead promoter for any concert since the mid-1980s, SPA.49-50, and since then, most of Rowe's work has come from Al Haymon and has involved primarily advertising and general street promotion.[8] SPA.49.

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[7] Plaintiffs' assertion, *see* Rowe Br. 7, 40, that in 2000, Rowe promoted the "national tour of the *Sugar Daddy* musical series" is misleading. As the district court found, *Sugar Daddy* was a "gospel musical play," not a concert performance of "contemporary music" —the sole subject matter of the amended complaint. SPA.50 n.72.

[8] Plaintiffs' assertion, Rowe Br. 8, that Rowe has "served as promoter" for "major acts," including the Temptations, Diana Ross, War, Aretha Franklin, The Spinners, and Al Green, is unsubstantiated in the record. Rowe never submitted any documentary evidence (such as any concert or venue contracts) to support his assertion that he ever promoted these artists. In any event, by Rowe's own account,

b) Lee King, King Productions: King, a local promoter in Jackson, Mississippi, works out of his home. SPA.53-54. King Productions has no regular or full-time employees. *Id.* King has *never* submitted a bid to promote a white artist and has *never* submitted, or has no recollection of ever submitting, a bid to CAA, WMA, or Renaissance to promote any artist, white or black. SPA.54. The largest artist guarantee King has ever paid is $12,500, and his net income was negative in 1993, 1995, and 1996. SPA.55. King has never promoted a national tour and the *last* concert King claims to have promoted as a lead promoter was in 1983-84. SPA.54. As with Rowe, most of King's work has come from Al Haymon, whom King assists with street promotion in the Mississippi market. SPA.54-55. At no time in the last two decades has King put up his own money for an artist or venue deposit, nor did he risk "any of his own money while working with Mr. Haymon." *Id.*[9]

c) Jesse Boseman, Sun Song Productions: Plaintiff Boseman, the sole shareholder of New York-based Sun Song Productions, has *never* submitted a written bid to any booking agency to promote a white artist, SPA.51-52 n.77, and was unaware whether Sun Song had submitted any written bids to any booking agency in the last five years for any act. SPA.52 n.76. During the last 20 years, Boseman worked almost exclusively as a street promoter

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these claimed "copromotions" took place more than two decades ago and, in some instances, involved nothing more than placing the advertising for the lead promoter. *See* A.17608.36.

[9] No evidence supports the conclusory assertion found in King's opposition affidavit, A.5330, and repeated throughout plaintiffs' brief, *see, e.g.*, Rowe Br. 9, 40, 41, that King promoted artists such as "James Brown, Chaka Kahn *[sic]*, Earth, Wind and Fire, the Commodores, Lionel Richie, the Jacksons, Patti LaBelle, Janet Jackson, Teddy Pendergrass and Puff Daddy."

for Al Haymon, "distributing flyers and hanging up posters in the New York area for a fixed fee"; he has never promoted a national tour. SPA.52-53.[10]

d) Fred Jones, Jr., Summitt Management Corporation: Plaintiff Jones formed Summitt in 1984 after his first promotion company, Star Entertainment, filed for bankruptcy and went out of business. SPA.55. Through Summitt, Jones focuses almost exclusively on "event management" for corporate clients—*not* promoting concerts for artists. SPA.56 n.86. As a corporate consultant, Jones never assumes any financial risk in the events for which he consults. SPA.56. Jones promotes almost exclusively in Memphis, Tennessee, has not actively sought to promote any concerts outside his local market since the early 1980s, and never has personally submitted any bids to promote a white artist. SPA.56 n.87. In 1992, Jones formed a partnership called "Island Events" with Bob Kelley, a local Memphis concert promoter. SPA.57; A. 17608.58. Island Events, in which Jones was a one-third partner, was the exclusive promoter through 1997 at city-owned Mud Island Amphitheater. Island Events served as the promoter for numerous concerts of prominent white and black artists at Mud Island. SPA.57.

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[10] Plaintiffs' assertion, Rowe Br. 8, that Boseman served as a "sole promoter" for Luther Vandross and Patti LaBelle is without substantiation in the record. By his own admission, Boseman served only as a street promoter for Haymon on concerts performed by Vandross and LaBelle. *See* A.17551. Similarly, there is no evidence to substantiate plaintiffs' assertion, Rowe Br. 8, 40, that Boseman ever copromoted Rick James, Teddy Pendergrass, or Prince, or that he was the "national copromoter" for The Jacksons' Victory Tour in 1984.

2. Plaintiffs Chose Not to Participate in the Concert-Promotion Business While Other Minority Promoters Flourished.

Plaintiffs' frivolous assertion that they accounted for most of the business done by black promoters, A.104, was correctly found by the district court to be "false and misleading," because the undisputed evidence establishes that "other black promoters," not plaintiffs, "have accounted for most of the business done by black promoters in the United States." SPA.47-48. Similarly, plaintiffs presented no evidence showing that the booking-agency defendants had "regularly retained" them to promote concerts anywhere, let alone concerts "throughout the United States" in the "largest and most important venues, as they falsely claimed. *Id.*; A. 105. The district court properly concluded that Rowe, Boseman, and King "did not have the capital, credit record, financial resources or record of successful concert promotion to compete for major acts with established black or white concert promoters" and that plaintiffs' "backgrounds as independent concert promoters" were "marginal" at best. SPA.63.

The undisputed absence of prior business dealings with the booking-agency defendants and any meaningful and consistent history of submitting bids exposed the frivolous nature of plaintiffs' claims. Before this lawsuit was filed, plaintiffs were virtual strangers to the booking-agency defendants and what "little contact" existed did not take place "until immediately before this lawsuit was filed." SPA.59-60; *see also* A.1508-15, 16390. Before suing, plaintiffs' principal contacts were a series of letters sent to CAA and WMA, complaining about their alleged "exclusionary" practices, demanding the right of "first refusal" on all black artists represented by WMA and CAA (without the necessity of submitting a

bid), and threatening to disrupt, by picketing and boycotting, the concerts performed by the artist represented by the booking-agency defendants unless plaintiffs' demands were satisfied. *See, e.g.*, A.1457-66, 1521-23, 1760-61, 1858-64, 15883-85. Plaintiffs had virtually no prelawsuit contacts with Renaissance: A. 1488-89.

Contrary to plaintiffs' allegations, the booking-agency defendants *had* substantial business dealings with other black promoters who were "far more successful than Plaintiffs," SPA.57-58, such as Al Haymon, Darryl Brooks, Bill Washington, Larry Bailey, and Earvin "Magic" Johnson. A.1509; 1500. Indeed, during the period in which plaintiffs claim to have been victimized by a vast racist conspiracy, Al Haymon promoted thousands of concerts in hundreds of venues across the United States, A.17608.71, including numerous national concert tours by major artists represented by the booking-agency defendants, such as Boyz II Men, Destiny's Child, Janet Jackson, New Edition, Lauryn Hill, Whitney Houston, and many others. SPA-61; A.17564. Haymon's company, with offices in Boston and Atlanta, has between 16 and 20 employees on staff to handle every facet of concert production and promotion. SPA.57-58. Haymon has put up multi-million dollar pre-performance deposits, has a business line of credit up to $2 million, A.1532-92, 17562-65, and has been far more successful in the concert promotion business than most white concert promoters. SPA.57.

Other successful black promoters with whom the booking-agency defendants had ongoing business relationships include Darryl Brooks, who promotes 100 to 200 concerts per year, SPA.58; *see also* A.17566; Larry Bailey, a West Coast promoter, who testified that approximately 50% of the concerts he had promoted in his career had been for white artists, SPA.58; *see also* A.

17565; Bill Washington, who promoted dozens of concert events in each of the relevant years, SPA.58; *see also* A.17566-67; and Magic Johnson, whose promotion company has promoted several national concert tours for major artists since 1998, SPA.58; *see also* A.17567. Each of these promoters has at various times promoted artists represented by the booking-agency defendants, as have several other black promoters. A.2747, 2786-88 (listing 39 black promoters who had promotion contracts in the booking-agency defendants' files, 16 of whom had at least 10 contracts each with the booking-agency defendants). Further, contrary to the amended complaint's essential premise that "[n]o black promoter, including plaintiffs, has been able to contract to promote a contemporary music concert given by a white artist," A. 104, the same successful black promoters identified above and others have "promoted concerts for well-known white artists," SPA.61, including numerous white artists represented by the booking-agency defendants. *Id.* (Eminem, Kenny G, Average White Band, Joan Baez, New Kids on the Block), SPA. 157 (e.g., Kiss, Harry Connick, Jr., Styx, Three Dog Night); *see also* A. 17568-70.

III. Relevant Proceedings Below

The district court initially dismissed plaintiffs' complaint, finding their conspiracy allegations wholly "conclusory in nature" and failing to "set forth conduct from which one could reasonably infer concerted action restraining trade by the named defendants." *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98 CIV. 8272 (RPP), 1999 WL 335139, at *5 (S.D.N.Y. May 26, 1999). The district court held that there was no economically plausible theory "for a booking agency to conspire with white concert promoters to restrain trade by

not dealing with black concert promoters," since it was "in the economic interests of each of the booking agents to have as much competition as possible among concert promoters so as to keep promoters' fees to a minimum, yielding greater revenues for the artists and larger commissions for the booking agents." *Id.* at *6. Plaintiffs' amended complaint offered up a new conspiracy "theory"—now abandoned on appeal—that a quid pro quo scheme existed in which the booking-agency defendants agreed to allow the promoter defendants to reduce competition and charge higher fees for the agencies' more successful acts in exchange for the promoter defendants' promises to promote concerts of lesser known artists on the booking-agency defendants' rosters. *See* A.130-31.

Based on the amended complaint's new allegations, the district court permitted plaintiffs to take extremely broad discovery for nearly three years, during which time they were given unlimited access to all of defendants' concert files, computerized email communications, and electronic concert databases. SPA.28, 37. Defendants produced millions of documents and files, as well as email communications and concert data from their respective computer databases. A.16328-29. Over sixty witnesses, parties and nonparties, were deposed. None of this discovery substantiated plaintiffs' claims and, after a painstaking review of the evidence, the district concluded that plaintiffs had:

- produced absolutely no direct or indirect evidence of a race-based conspiracy in restraint of trade, either by way of an agreement to allocate territories to dominant promoters or an agreement to allow the promoter defendants to promote lesser acts in exchange for the promotion of successful acts and territorial dominance, SPA.22, 28, 36-37, 41-42;

- produced absolutely no direct or indirect evidence to support a prima facie case of discrimination as to any of the specific discrimination claims alleged in the amended complaint, involving concert engagements for Kenny G, Maxwell, Erykah Badu, Lauryn Hill, Prince, or Janet Jackson, SPA. 108-73;[11] and
- produced absolutely no evidence from which a reasonable jury could properly infer discrimination. *See, e.g.,* SPA.115, 124, 127, 135-62, 173.

Indeed, rather than even attempt to rely on the reams of information collected in discovery, much of plaintiffs' opposition to the summary-judgment motions relied solely on assertions and speculation in Rowe's opposition affidavits, which the court found to be conclusory, without foundation, beyond Rowe's personal knowledge, and filled with inadmissible hearsay and expert testimony by a lay witness. *See, e.g.,* SPA.12 n.17, 27 n.45, 41 n.59, 62-63, 94 n.131, 105. Similarly, although plaintiffs continue to rely on a Richard Johnson affidavit as substantiating their claims of a territorial monopoly and racist conspiracy, Rowe Br. 13-15, the district court found that (1) Johnson's affidavit provided *no* probative evidence of any conspiracy, racist or otherwise; (2) Johnson has not been involved in the concert-promotion business for 25 years; (3) Johnson did not claim to know of any discriminatory acts or even the plaintiffs themselves; and (4) Johnson had no knowledge of booking-agency defendants CAA and Renaissance, entities that did not even exist during Johnson's brief sojourn in the industry. SPA.31-33, 41 n.60, 113 n.149, 129.

[11] The relevant facts concerning plaintiffs' individual § 1981 claims are set forth in section II of the argument, *infra*.

The district court awarded summary judgment to the booking-agency defendants, finding that plaintiffs had "raised no genuine issue of material fact and that no rational trier of fact could find for Plaintiffs on any of the myriad of claims made in this action." SPA. 173-74. Underlying the district court's conclusion was the lack of any direct or indirect evidence of conspiracy, *see, e.g.*, A.17570-74, and the lack of any evidence of racial animus on the part of any of the defendants, *see, e.g.*, A.17477-79, 17493, 17516-17.

STANDARD OF REVIEW

The Court reviews the district court's decision to grant summary judgment *de novo. Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 104 (2d Cir. 2002). To survive summary judgment, plaintiffs had to raise a genuine issue of material fact, which required them to "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986). If no rational factfinder could find for plaintiffs based on the record as a whole, there is no genuine issue for trial, and summary judgment was appropriate. *Id.*

As to plaintiffs' discrimination claims, "[i]t is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases." *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2d Cir. 2001). In particular, when a plaintiff makes only conclusory allegations, and fails to muster evidence to support them, summary judgment is appropriate. *Bickerstaff v. Vassar College*, 196 F.3d 435, 452 (2d Cir. 1999) ("Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judg-

ment."); *see also Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985).

As to plaintiffs' antitrust claims, the Court has recognized that "summary judgment is an important procedural device in antitrust cases, because it enables courts to efficiently resolve potentially costly and time-consuming litigation which can chill competitive forces." *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 55 (2d Cir. 1997); *accord Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 541-42 (2d Cir. 1993). Therefore, "in the context of antitrust cases . . . summary judgment is particularly favored." *Pepsico*, 315 F.3d at 104.

SUMMARY OF THE ARGUMENT

Summary judgment should be affirmed because there is no evidence of any race-based conspiracy by the booking-agency defendants. Instead, the undisputed evidence shows that plaintiffs are complaining about business that goes to other black and white promoters through decision-making by the artists, without regard to race, and that there is no evidence of any meetings, discussions, conduct against independent interest, or any other basis from which to prove or infer any conspiratorial behavior by the booking-agency defendants. To give just a few examples of the absurdity of plaintiffs' claims, when confronted with evidence that a concert they are complaining about losing was promoted by another African-American promoter, Magic Johnson, plaintiffs argue that Maxwell chose Magic Johnson in "an exercise in pure tokenism," Rowe Br. 27, without any evidentiary basis for that offensive charge. Similarly, when arguing that the City of Memphis's refusal to award Jones exclusive rights to the Mud Island concert venue was the result of

a conspiracy to discriminate, they disregard outright the undisputed testimony of the African-American mayor of Memphis that he made that decision alone without any input from any defendant. Plaintiffs' reliance on pure fantasy, and their complete failure of proof dooms both the civil-rights and antitrust conspiracy claims. This is particularly so because plaintiffs' incredible allegations of a conspiracy by the booking-agency defendants to divide territories among the leading white promoters would cause the booking-agency defendants to suffer economic losses (as a result of higher promotion fees) and thus would make no economic sense. The Supreme Court has made it clear that such an irrational conspiracy may not be inferred.

Plaintiffs' claims of individual civil-rights violations fare no better. Plaintiffs' claims of an industry-wide practice of race-based disparities in contracting practices are without any probative support in the record. Because this is not a class action, plaintiffs must produce evidence of specific acts of discrimination committed by the individual booking-agency defendants against the individual plaintiffs. No such evidence exists. The undisputed evidence shows that plaintiffs rarely, if ever, submitted bids to the booking-agency defendants for any concerts at all. Indeed, in only a small handful of specific incidents do plaintiffs assert acts of discrimination by individual booking-agency defendants, and none of them passes muster under the summary-judgment test. In each instance, the actual evidence, contrary to plaintiffs' false accusations and mischaracterizations of the evidence, does not support even a prima facie case of race discrimination. There is not even the thinnest reed of support for plaintiffs' racial-discrimination claims against any of the booking-agency defendants.

In short, the record presents the best case for affirming a grant of summary judgment. After exhaustive discovery, there has been a complete failure of proof. The undisputed evidence shows that the most significant contact that plaintiffs have had with the booking-agency defendants has been to threaten them with economic boycotts and to picket their offices for refusing to cave in to the baseless claims in this litigation. This type of abuse of the civil-rights and antitrust laws strikes at the heart of the important public policies that underlie these statutes. The district court's grant of summary judgment —on this barren and unsupported record—was precisely the right result. The decision should be affirmed.

ARGUMENT

It is important at the outset to understand the scope and nature of this case. This appeal is not, as plaintiffs assert, about the practices of the entire concert-promotion industry, not only because this is not a class action and plaintiffs have no standing to assert alleged wrongs beyond their own experiences, but also because plaintiffs have abandoned their claims of a vast racist conspiracy. It is well established that allegations about industry-wide practices cannot, without more, support claims of individual discrimination in violation of 42 U.S.C. § 1981. Plaintiffs' attempt to draw the focus away from their individual claims of discrimination and toward generalized allegations about practices in the industry is misconceived. Only specific acts of alleged discrimination by the defendants against the named plaintiffs are properly at issue on this appeal.

I. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON PLAINTIFFS' CONSPIRACY CLAIMS.

A. Plaintiffs Have Abandoned Most of Their Wide-Ranging Conspiracy Theories.

This case began with plaintiffs claiming a vast racist and anticompetitive conspiracy that spanned decades and implicated practically the entire concert-promotion and talent-booking industries. A. 104-05. After three years of exhaustive discovery, plaintiffs could muster no evidence to support their fantastic claims of an industry-wide conspiracy, and they have almost entirely abandoned them on appeal. Plaintiffs' failure to pursue in their opening brief their claims of an industry-wide discriminatory conspiracy, and of a group boycott in violation of the antitrust laws, waives them for this appeal. *See, e.g., EEOC v. Local 638,* 81 F.3d 1162, 1179 (2d Cir. 1996); *NLRB v. Star Color Plate Senv.,* 843 F.2d 1507, 1510 n.3 (2d Cir. 1988).

The only conspiracy claims plaintiffs maintain on appeal are (i) their claim of a specific conspiracy in violation of §1985(3) against plaintiff Jones to deprive him of the Mud Island contract and (ii) their claim of an antitrust conspiracy in the form of an alleged agreement among concert promoters to allocate territories among the booking agents. Those claims both fail for reasons set forth below.

B. Plaintiffs Produced No Evidence of Agreement Among the Defendants to Support Any Conspiracy Theories.

Even if plaintiffs had not waived their claims of a far-reaching discriminatory conspiracy among promoters

and booking-agencies, they produced no evidence to support an inference that any such conspiracy ever existed. The same is true of their claims that defendants joined a conspiracy in restraint of trade. The touchstone of conspiracy claims, whether under the antidiscrimination or antitrust laws, is the existence of an agreement among the defendants. Agreement means a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 1471 (1984).

A plaintiff asserting antitrust-conspiracy claims must produce direct or circumstantial evidence that reasonably tends to prove that conscious commitment, and a plaintiff seeking to show agreement based on indirect evidence must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. *Id.* at 764, 104 S.Ct. at 1471; *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 507 (2d Cir. 2004); *Pepsico*, 315 F.3d at 105. Crucially, conduct that is "as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588, 106 S.Ct. at 1356. "An antitrust plaintiff may not . . . rest on conclusory assertions of conspiracy when the defendants have proffered substantial evidence supporting a plausible and legitimate explanation of their conduct." *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, F.2d 919, 923 (2d Cir. 1985).

Similarly, § 1985(3) requires plaintiffs to come forward with evidence establishing that defendants agreed and had a meeting of the minds to achieve the conspiracy's objectives. *See Thomas v. Roach*, 165 F.3d 137, 146-47 (2d Cir. 1999). A § 1985 conspiracy can be proven only where there is some direct evidence of concerted action. *See, e.g., Griffin v. Breckenridge*, 403 U.S.

88, 90-91, 91 S.Ct. 1790, 1792-93 (1971); *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y., Inc.*, 968 F.2d 286, 288 (2d Cir. 1992).

Beyond the fact that representatives of each of the booking-agency defendants testified without contradiction that there was no agreement among the defendants to discriminate or engage in anticompetitive behavior, A.1384, 1389, 1486-87, 1501, 1515, 1625, several third-party witnesses, including several nonplaintiff black promoters, denied any knowledge of such an agreement, A.2534-36, 3690, 17572-74. Plaintiffs themselves testified that they had no direct personal knowledge of any facts directly demonstrating the existence of an agreement among all defendants, or any subset of them. A.2534, 17570-72.

Nor did any indirect evidence support plaintiffs' broad-ranging conspiracy theories. While plaintiffs themselves have never been successful concert promoters, other black promoters have thrived, and the booking-agency defendants themselves have done significant amounts of business with black promoters including Al Haymon, Lionel Bea, Darryl Brooks, Bill Washington, Magic Johnson, and Larry Bailey. A.1375, 1500, 2535, 17562-70. Even plaintiffs themselves have been hired by the booking-agency defendants' clients on a few occasions, though not to promote a nationwide tour, for which they lacked sufficient experience, reputation, and risk capital. A.2540-41. Indeed, the undisputed evidence showed that another booking agency who was not alleged to be part of the conspiracy, International Creative Management, Inc., did not do lead concert promotion business with plaintiffs because they lacked the ability to compete with other lead promoters, such as Haymon. A. 17560-62. Even Haymon and other black promoters did not see plaintiffs as having the skills to compete with them. *Id.*

Most important, the primary explanation for plaintiffs' failure to obtain significant concert-promotion business was that they rarely, if ever, submitted bids on any concerts. *See, e.g.*, SPA.48-60, 155-57, 162-65; A.1488, 1502, 2541, 16050. Further, because artists, not booking agencies, have the ultimate power to select promoters and the booking-agency defendants had standing policies to forward all bids from promoters to artists, *see, e.g.*, A.1374, 1502, 1611, the booking agencies lacked the power to carry out any alleged discriminatory or anti-competitive conspiracy. Plaintiffs adduced no evidence that any of their bids were ever withheld from an artist's management. Finally, the evidence flatly contradicted plaintiffs' claim that no black promoter had ever promoted a major white artist, *see* SPA-61, which was a primary basis for the district court's decision to allow plaintiffs' conspiracy claims to survive defendants' motion to dismiss. *See Rowe*, 1999 WL 335139, at *7; A.1611, 16050; *see also* Rowe Br. 46 (implying lack of evidence of contracts between "top booking agencies" and black promoters for white acts).

In short, there was no direct evidence of a conspiracy among defendants, and no indirect evidence that would permit a reasonable jury to infer the existence of such a conspiracy among defendants, either to discriminate against black promoters or to restrain trade in the promotion industry. The district court therefore correctly concluded that plaintiffs had failed to show any agreement among defendants, or any subset of defendants, either to restrain trade or to discriminate against plaintiffs by denying them contracting opportunities. SPA.29-42, 124-34, 155-59, 166-73.

C. Plaintiffs Produced No Evidence to Support Their Remaining § 1985(3) Conspiracy Claim as to the Mud Island Contract.

Jones's claim that he was the victim of a conspiracy between the booking-agency defendants and promoter-defendant Beaver Productions to deprive him of an exclusive contract to promote events at Memphis's Mud Island Amphitheatre is devoid of any evidentiary support. The district court found that Jones sent letters to certain booking agencies falsely informing them that he had an exclusive agreement to promote at Mud Island, when in fact he did not, because the draft agreement had not yet been approved by Mayor Herenton of Memphis. SPA.98. The mayor who, as an African-American, resented plaintiffs' accusation that he had joined a racist conspiracy, A.3754, 3756-57, testified that he alone made the decision not to award an exclusive contract for that venue (to anyone at all) without any influence from Beaver Productions or the booking-agency defendants. The undisputed evidence also showed that the mayor did not see, and was not influenced by, the letter from Barry Leff encouraging the Memphis Park Commission not to grant an exclusive contract to any promoter.[12] SPA.99-100; A.3754. Further, as the district court found, there was no evidence of any racial animus behind Beaver Promotions's decision to enter the Memphis market, much less any evidence of animus by the booking-agency defendants. SPA. 101-02, 125-27, 155.

Plaintiffs mistakenly assert that they should have been allowed to go to a jury based solely on their insistence that the mayor's testimony is not credible. Rowe Br. 12, 69; *see Martin v. Citibank, N.A.*, 762 F.2d 212, 217-18

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[12] In addition, Leff testified that no booking agency had asked Beaver to open an office in the Memphis market. A.4199-201.

(2d Cir. 1985) (plaintiffs' claim that jury would disbelieve witness does not create a genuine issue of fact for trial); *Dyer v. MacDougall,* 201 F.2d 265, 269 (2d Cir. 1952) (L. Hand, J.) (same); *Berman v. Parco,* 986 F.Supp. 195, 200 (S.D.N.Y. 1997) (same). Jones might have attempted to come forth with testimony from the Memphis officials who actually received the Leff letter showing that the mayor was aware of the letter or in some other way contradicting the mayor's testimony, but never did so. SPA.100. Because there was no evidence that the defendants harbored any racial animus towards Jones or participated in any attempt to deny him the contract, and because the undisputed evidence showed that defendants had nothing to do with the mayor's decision not to award Jones the contract, the district court's summary judgment on Jones's § 1985(3) claim was correct.[13]

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[13] In addition, all of plaintiffs' § 1985 claims, both abandoned and preserved, fail as a matter of law because a conspiracy claim under § 1985(3) cannot be stated based on allegations of § 1981 violations. *Brown v. Philip Morris Inc.,* 250 F.3d 789, 806 (3d Cir. 2001) ("The great weight of precedential authority . . . supports the traditional limitation of § 1985(3) to questions of interstate travel and involuntary servitude and does not suggest that §§ 1981 or 1982 claims in general may form the basis of a § 1985(3) action."); *but see Washington v. Niagara Mohawk Power Corp.,* 103 F.Supp.2d 517, 521 (N.D.N.Y. 2000) (opining that violation of § 1981 rights may serve as basis of § 1985(3) conspiracy, but rejecting plaintiffs' claim).

Because plaintiffs' § 1985(3) claims fail, their § 1986 claims also necessarily fail as a matter of law. *Kaylor v. Fields,* 661 F.2d 1177, 1184 (8th Cir. 1981). In any event, plaintiffs have waved their § 1986 claims by not raising them in their opening brief.

D. Plaintiffs Produced No Evidence to Support Their Antitrust Claim of a Territorial-Allocation Conspiracy.

1. The Evidence as a Whole Clearly Is More Consistent With an Inference of Independent Action Than of Conspiracy.

Plaintiffs' brief is completely devoid of citation to any evidence that purports to show an agreement *among the booking-agency defendants* to honor any alleged territorial allocation.[14] Instead, uncontested evidence showed that competition between booking agencies is fierce. *See, e.g.*, A.2810, 2836-38. Likewise, there was no probative evidence of any agreement between individual booking agencies and promoters to honor territorial allocations. Instead, the evidence showed that numerous promoters promoted concerts on multiple occasions in the alleged territory of allegedly dominant promoters, SPA.35 n.56 (collecting 15 examples and alluding to others). There was also evidence that the defendant promoters did not, in fact, dominate "their" markets, *see, e.g.*, A.2491 (demonstrating that defendant-promoter Beaver is not dominant in the New Orleans market). Plaintiffs relied on conclusory statements by Rowe, which the district court excluded because they were not based on personal knowledge or a statistical survey of defendants' contracts, *see* SPA.27 n.45, and whose exclusion plaintiffs do not challenge on appeal.

Just as important, plaintiffs presented no admissible evidence that the defendant booking agencies exclu-

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[14] Even the Leff letter about the Mud Island contract, A.761, never mentions any of the booking-agency defendants by name, nor does it even imply that booking agencies communicated with one another before allegedly communicating with Leff.

sively or primarily used the defendant promoters inside those promoters' alleged "territories." The uncontested report of defendants' expert showed that the booking-agency defendants collectively directed more than 60% of their business to nondefendant promoters. A.2828, 2846; *see also* SPA.128-29; A.1500, 1502 (less than 10% of defendant WMA's work for its clients was with the supposedly "dominant" concert promoter defendants).

The fact that the promoter defendants do most of their business within particular geographic areas does not show either any agreement between them to respect territorial divisions or any participation by the booking agencies in such a purported agreement. It merely shows that particular promoters, by dint of local experience, local presence in the market, and hard work, had achieved most of their success in their home markets. SPA.32-33; A.5110. Their efforts were often aided by promoters' relationships with particular venues in their local markets. *See, e.g.*, A.2801, 3676, 7277 (asking promoters to hold particular venues for upcoming tours).

In the absence of any evidence indicating that any alleged conspiracy to divide territories among promoters was carried out, and any direct or inferential evidence to indicate that the alleged conspiracy ever existed, no reasonable jury could infer that there was such a conspiracy by the booking-agency defendants. *Burlington*, 769 F.2d at 923. Because plaintiffs produced no evidence to show that conspiratorial rather than independent conduct was the more likely explanation for the facts in evidence, summary judgment for defendants was required. *Matsushita*, 475 U.S. at 588, 106 S.Ct. at *1357*.

2. The Isolated Documents Plaintiffs Seize Upon Do Not Raise a Fact Issue as to the Existence of a Nationwide Conspiracy to Allocate Territories Among Promoters.

The bits and pieces that plaintiffs pick out from the heap of discovery do not suffice to create a genuine issue of material fact as to the existence of an anticompetitive agreement to allocate territory. First, the territory memo plaintiffs cite, A.5481, shows, at most, a list of leading concert promoters in six markets, out of scores, in the U.S. It does not list all markets nationwide, nor does it list all, or only, defendant promoters. *Id.* (listing five promoters not named as defendants). Significantly, in most of the markets the memo does mention, it lists two promoters rather than one, including defendant Jam's Chicago market, directly contradicting plaintiffs' allegation that each market is anticompetitively allocated by the booking agencies to one dominant white promoter. A.8802 ("Each major market in the United States is controlled by a single white promoter.").

Most importantly, the memo does not reflect any *agreement* between an individual agent (much less CAA as a whole) and any of the listed promoters to "honor" the listed territories. The memo on its face can be plausibly read only as a contact list of promoters who had independently achieved their position in the market, but not as evidence of an agreement to allot territories. *See Matsushita,* 475 U.S. at 588, 106 S.Ct. at 1356 ("[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.").

This is especially true because there is no evidence that the memo was written by anyone at CAA with authority to influence promotion contracts or to make

agreements on behalf of CAA. Although plaintiffs misleadingly state that Carole Kinzel wrote the memo, Rowe Br. 79, Kinzel's uncontested affidavit unequivocally states that the handwriting is not hers and that she had never seen the document. A.16029-30. Plaintiffs never asked about the document at her deposition, nor did they produce any admissible testimony to contradict her sworn statement that she had not written it.[15] Indeed, a cursory comparison of the territory memo to Kinzel's memo about deposit terms for the Janet Jackson tour makes it obvious that the same person did not write both notes. *Compare* A.5482-83 *with* A.15795.

Likewise, the other isolated documents plaintiffs cite do not support any inference of conspiracy. The cited correspondence between WMA and promoters in San Francisco about an upcoming Culture Club concert showed that WMA was willing to, and did, actively solicit bids from promoters in the Bay Area other than Bill Graham Productions. A.10985 (expressing willingness to use another promoter), 10987 (soliciting bids from another promoter); 11298 (stating that "I have no problem using another promoter [besides Graham] in the Bay Area"). These documents do not support any inference of an agreement among promoters to allot territory to one another or among the bookers to respect any such allocation.

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[15] Plaintiffs chide the district court for not discussing this memo in its antitrust analysis, Rowe Br. 79, but plaintiffs themselves did not mention it in their summary-judgment briefing discussing the alleged territorial allocation. A.880203. The district court *did* discuss the memo in the context of plaintiffs' § 1985 allegations, finding that the memo had no probative value because of Kinzel's unrebutted testimony that she had not written it. SPA.82.

3. Plaintiffs' Failure of Proof Is Especially Acute Because the Alleged Conspiracy Is Economically Irrational.

Moreover, it would have been economically irrational for the booking-agency defendants to have joined the alleged conspiracy. When an alleged anticompetitive conspiracy is contrary to the defendants' own economic interests, plaintiffs must produce especially compelling evidence of an agreement to survive summary judgment. *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356 ("[I]f the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary."); *see also AD/SAT, Div. of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 235 (2d Cir. 1999).

In this case, the purported conspiracy to allocate territories would *raise prices* for promotion. *See Matsushita*, 475 U.S. at 596, 106 S.Ct. at 1361 ("[A] horizontal territorial allocation['s] . . . natural effect would be to raise market prices rather than reduce them."). Indeed, plaintiffs themselves alleged that, in the absence of the purported conspiracy, promotion costs would drop from approximately 15% to 5%. A.131; *see also* A.8815. Because higher prices for promotion mean lower revenues for artists, and consequently lower revenues for booking agencies, A.2677-78, 2802, the booking-agency defendants would directly harm their own economic interests by entering into the alleged territorial allocation.

Ignoring the economic irrationality of the alleged conspiracy, plaintiffs advanced the theory—unsupported by a scintilla of evidence—that the conspiracy would be made profitable by a quid pro quo whereby the dominant promoters agreed to promote agencies' "lesser acts" in

exchange for the agency allowing them to promote their "stellar acts" and for the agency honoring their territorial allocation. *See, e.g.*, A.131. Defendants' economic expert showed that it would be impossible for them to recoup the losses they would suffer by honoring the conspiracy through the revenues gained from the promotion of lesser acts, A.2806, and numerous witnesses testified —without contradiction—that there is fierce competition among booking agencies for talent and that artists frequently change agencies. *See, e.g.*, A. 1501. Thus, it would be impossible to maintain the asserted conspiracy because any "lesser act" that became a "stellar act" would immediately leave the conspiring agency for a nonconspirator offering better (i.e., competitive) terms, so that the conspiring agency could never recoup its loss. *See, e.g.*, A. 1487, 1501, 2807-08, 2810, 2836.

The district court properly found that plaintiffs failed to present any probative evidence of conspiracy, much less the especially persuasive sort of evidence necessary to infer the existence of the economically irrational conspiracy they alleged. SPA.29-41.

II. The District Court Correctly Granted Summary Judgment on Plaintiffs' § 1981 Discrimination Claims.

This is not a class-action suit, and the district court was correct to focus on particular instances of alleged discrimination rather than on general allegations against the industry. Once plaintiffs' allegations about the industry as a whole are exposed as both false and irrelevant, little is left of plaintiffs' claims except five particular alleged instances of discrimination. Although reduced to those five incidents, plaintiffs persist in their scattershot approach to making claims and frequently distort and misrepresent the record, making it necessary to respond

to each claim and clarify what actually was (and was not) in the record. A careful review of the evidence concerning each of those incidents demonstrates conclusively that plaintiffs were not discriminated against on any of those occasions.

A. Plaintiffs' Generalized Allegations of Industry-Wide Disparities in Contractual Terms and Contracting Practices Are Unsubstantiated and Do Not Support Their Individual Discrimination Claims.

1. Plaintiffs' Claims of Systemic Disparities Are Unsupported by Any Probative Evidence.

Plaintiffs' claims of systemic disparities in guarantee, deposit, and notice terms against African-American promoters are simply not supported by the record. Their suggestion that "[t]he fact that Plaintiffs receive inferior notice, inferior information, inferior financial terms . . . is hardly in dispute," Rowe Br. 64, is patently false and contradicted by all of the relevant evidence. SPA.129-32, 141, 155-59, 169-71.

Agents and promoters—including plaintiffs themselves—repeatedly testified that promoters seek out, and are expected to seek out, information about tours from booking agents. *See, e.g.*, SPA.14; A.3426, 3430, 3672-73, 4266-67, 17531. There is no legal support for plaintiffs' claim that the booking agencies had to provide them notice. SPA. 158. Nor is there any support for plaintiffs' claims that the booking-agency defendants systematically gave advance notice of tours only to white promoters. As to Renaissance, for example, plaintiffs cite no evidence for their claim that Renaissance had a "solicitation process" from which they were excluded.

Rowe Br. 46. They also cite no evidence that CAA gave advance notice only to white promoters about upcoming tours.[16] To the contrary, CAA specifically encouraged Rowe to bid on concerts by giving him preferential advance notice of upcoming tours, and expressly stated that it was not CAA's regular practice to notify promoters of upcoming tours. A.1422; *see also* A.1388. And black promoter Lionel Bea testified that he had received notice of upcoming shows from both CAA and WMA. A.3138-42.

As to WMA, plaintiffs cite two pieces of correspondence from Maxwell's 1998 tour, one of which says only that WMA was "negotiating with" promoters, not that it had given any of them advance notice of the tour, and the other of which was sent to promoters who had already bid on, and been awarded, copromoter roles for that tour. A.8986, 8983. They also cite a similar memo to promoters who had already been awarded dates for Maxwell's 1999 tour. A.8992-93. None of these documents demonstrates advance notice to promoters that Maxwell would be going on tour. The remaining documents that plaintiffs cite all pertain to one tour, a 1998 tour by the group Culture Club. A.10913-17, 10919-41, 10943-83. Evidence that one agent at one booking agency gave promoters advance notice of one tour does not support the sweeping claim that the booking-agency defendants systematically gave advance notice only to white promoters, particularly because it was undisputed that the notice of the Culture Club tour was given based on the promoters' previous working relationship with the band, not because of race. A.16572.

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[16] There was evidence, which plaintiffs do not cite, of CAA sending advance notice to allow a promoter to procure a venue hall, A.7272, but there was no evidence that the practice was either systematic or discriminatory.

Plaintiffs' claim of race-based disparities in contractual terms is similarly unsubstantiated. As the district court observed, any disparities in contractual terms were the result not of race-based policies, but of negotiations between promoters and booking agencies, subject to artists' final approval. *See* SPA.84-87, 105-06, 129-32, 169-71. A 50% deposit was the default term offered to promoters, and deposits less than 50% were the result of negotiations, as is evident from the fact that those terms are handwritten onto the contracts. *Id.* Plaintiffs did not obtain lower deposit terms because they did not bid in the first place, but instead demanded "participation" backed with threats of protest and boycott. And when they did bid, their response to rejection was not to counteroffer but, again, to threaten boycotts.[17] *See, e.g.*, A.1457-66, 1521-23, 1760-61, 1858-64. Indeed, plaintiffs, through an organization they founded and named the Black Promoters Association, made plain to the booking agencies that they did not seek an opportunity to compete and negotiate on a level playing field: **"We are asking for first right of refusal on all African-American tours.** Nothing will be accepted in the future by us but 100% black promoter involvement." A.15884 (emphasis in original); *see also* A.15780 (same demand). In any event, plaintiffs' reputations as promoters were never sufficiently strong to enable them to negotiate the

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[17] Plaintiffs expect the Court (as they did the district court) to do their work for them. Instead of pointing to expert testimony, or even a lawyers' summary, of the number of instances of late payments, for example, plaintiffs state there were "many instances" of late payments and cite to four thousand pages of documents. Rowe Br. 19. That is not sufficient to satisfy plaintiffs' burden to point to evidence in the record requiring reversal of the district court's summary judgment. *See, e.g., Brown v. Reardon*, 770 F.2d 896, 909 (10th Cir. 1985) ("Judges are not ferrets.").

favorable terms obtained by successful black and white promoters. SPA.86.

Variation in contract terms proves the competitive nature of the industry, and plaintiffs' attempt to draw conclusions from a handpicked sample of contracts was properly rejected by the district court as a transparent effort to create an illusion of discrimination. SPA.62 n.101, 104-05, 107, 131 n.173. Plaintiffs cherry-picked a sample of 2650 contracts from defendants' files, Rowe Br. 18, out of a universe of tens of thousands of promotion contracts made available to plaintiffs during discovery. *See, e.g.*, SPA.128 (WMA's electronic database alone contained 86,502 confirmed bids for the period from 1995-2001); *see also* A.1249. But plaintiffs' attempt to use that skewed sample to generalize about contracting practices in the concert-promotion industry was improper, just as it would be to select several pennies from a bag of mixed change and declare that the bag contains only pennies. Plaintiffs introduced no expert testimony to show they selected a representative sample of all contracts, or even that plaintiffs' claims about the disparities in contract terms are accurate.[18] Instead, plaintiffs' own expert testified he made no attempt to verify that the selected contracts were statistically representative, A.3777; defendants' expert statistician testified that plaintiffs' biased selection process was incompetent to draw reliable conclusions about the industry, A.2746-47, 16754-55; and the district court

[18] Instead, plaintiffs attempted in the district court to bootstrap their biased sample into probative evidence by supporting it with Rowe's conclusory statements about the industry. *See, e.g.*, A.1834-36. They have wisely abandoned that attempt on appeal, because Rowe is not an expert statistician, he lacks first-hand knowledge of the comprehensive contents of defendants' files, and his testimony was obviously conclusory and self-serving. SPA. 105-06; A.16754-55.

found that plaintiffs' selection of isolated documents was not probative of defendants' patterns and practices. SPA. 131-32 n.173.[19]

Plaintiffs' self-serving selection of a small percentage of all promotion contracts does not tend to prove anything about contracting practices in the industry as a whole. *See, e.g., Bush v. Commonwealth Edison Co.*, 990 F.2d 928, 932 (7th Cir. 1993) (noting that the failure to examine a random sample of work records prevented the proffered statistics from demonstrating a pattern of racial discrimination); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997) ("[T]he sample must be a *randomly selected one* of sufficient size so as to achieve statistical significance to the desired level of confidence in the result obtained."). The purported evidence about systemic disparities in contractual terms to which plaintiffs refer is really no evidence at all. It was far from "puzzling," Rowe Br. 20, then, that the district court rejected plaintiffs' purported "evidence" of systemic disparities in contracting practices. No other conclusion was possible.

Because plaintiffs could not support their allegations of industry-wide disparities, defendants were required

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[19] The insufficiency of this sort of "evidence" is exemplified by the district court's examination of the contracts plaintiffs submitted purporting to show disparate contract terms as to Renaissance. The court found that (1) 138 out of 252 of the contracts were duplicates, (2) the sample of 114 distinct contracts had been "culled" from the thousands of contracts Renaissance produced to plaintiffs, and (3) 20 of the contracts actually involved payment of a 50% deposit. SPA. 170-71 & n.222. The court further found that plaintiffs' selective comparison of a 50% deposit in a contract between plaintiff Jones and artist Deborah Cox with a 10% deposit in a contract with a white promoter was "highly misleading" because plaintiffs had failed to acknowledge or adduce 29 other contracts between white promoters and Cox in which 50% deposits were required. SPA. 169.

only to point out the gap in plaintiffs' proof to be entitled to summary judgment. *See Pepsico, 315* F.3d at 105; *Brady v. Town of Colchester,* 863 F.2d 205, 210-11 (2d Cir. 1988); *see, e.g.*, A.16051-53. Nonetheless, defendants did produce evidence directly contradicting plaintiffs' unsupported claims of systemic contracting disparities. For example, defendants produced evidence of numerous white promoters who contracted to pay 50% deposits on the 1997 Kenny G tour and the 1999 Lauryn Hill tour, and of deposits paid by black promoter Larry Bailey on the Kenny G tour that were less than 50%.[20] A.16002-28, 16513-18. Thus, plaintiffs' claim that the Lauryn Hill tour is a "stark example of the application of these [racially] disparate terms," Rowe Br. 20, is simply not true. It is exactly the opposite-an example of terms varying between promoters based not on race, but on individualized negotiations between promoters and artists. SPA.83-86, 106-07, 132, 171. Plaintiffs' claims of systemic disparities in contracting terms and practices simply are not supported by any probative evidence.

2. Plaintiffs' Claims of Systemic Disparities in Contracting Terms and Practices Are Legally Insufficient to Support Their Individual Discrimination Claims.

Regardless, plaintiffs' unsubstantiated allegations of systemic disparities in contractual terms and contracting practices cannot support individual § 1981 claims by

[20] Plaintiffs' response—that Bailey was able to negotiate favorable terms because of his relationship with Kenny G, Rowe Br. 22 n.8—just proves the point that artists, not booking agencies, make the ultimate decisions with respect to concert-promotion contracts. And their (self-contradicting) claim that Bailey never received deposit terms of less than 50%, Rowe Br. 20, is refuted by the documents in the record. A.16026-28.

particular plaintiffs. *See Brown v. Coach Stores, Inc.*, 163 F.3d 706, 711 (2d Cir. 1998). Nor did plaintiffs plead a class-action claim that might have been substantiated by pattern-and-practice evidence. *See Frank v. Xerox Corp.*, 347 F.3d 130, 136 (5th Cir. 2003) (pattern-or-practice method of proof not available in nonclass action suits); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 761 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031, 119 S.Ct. 2388 (1999) ("The Supreme Court has never applied the [*Int'l Bhd. of*] *Teamsters [v. United States*, 431 U.S. 324, 97 S.Ct. 1843 (1977)] method of proof in a private, non-class suit charging employment discrimination."). Therefore, plaintiffs' claims of systemic disparities in contracting terms and practices are not only unsubstantiated, but also legally incapable of getting plaintiffs past summary judgment. *See Martin*, 762 F.2d at 218; *Hudson v. IBM Corp.*, 620 F.2d 351, 355 (2d Cir. 1980). The same is true of plaintiffs' repeated allusion to Alex Cooley's statement that a "good old boy" network exists in the music industry, and to other witnesses' general statements that "discrimination exists" in the industry or society in general. Rowe Br. 14, 16.

Plaintiffs could survive summary judgment on their § 1981 claims only by proving that a particular plaintiff was discriminated against by a particular defendant with respect to a particular contract. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 187 n.7, 109 S.Ct. 2363, 2378 n.7 (1989); *Coach Stores*, 163 F.3d at 708; *PAS Communications v. Sprint Corp.*, 139 F.Supp.2d 1149, 1174 (D. Kan. 2001); *see also Brown v. Am. Honda Motor Co.*, 939 F.2d 946, 950 (11th Cir. 1991) (explaining that disparate-impact ev dence cannot support § 1981 claims). Only five specific instances are identified by plaintiffs in which they claim to have been discriminated

against in the bidding for a particular contract by CAA or WMA. As discussed below, none of those specific claims are supported by any probative evidence. (Notably, as to Renaissance, plaintiffs do not allege even one specific instance of discrimination.)

B. Plaintiffs' § 1981 Claims Fail Under *McDonnell Douglas's* Burden-Shifting Framework.

Section 1981 provides that all persons "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." § 1981 (a). To succeed under § 1981, a plaintiff must "show both that he was subjected to intentional discrimination, and that this discrimination interfered with a contractual relationship." *Murray v. Nat'l Broad. Co.*, 844 F.2d 988, 995 (2d Cir. 1988). Absent direct evidence of intentional discrimination, the principles of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), apply to § 1981 claims. *Patterson*, 491 U.S. at 186, 109 S.Ct. at 2377. Plaintiffs bear the initial burden of presenting evidence that could give rise to a reasonable inference of race discrimination. The initial burden is not heavy, but is not as light as plaintiffs suggest. Rowe Br. 37.

The Supreme Court noted in *McDonnell Douglas* itself that the requirements of a plaintiff's prima facie case of discrimination may vary depending on the circumstances involved. 411 U.S. at 802 n.13, 93 S.Ct. at 1824 n.13; *see also Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094 (1981) (explaining that the standard must be tailored to accommodate "differing, factual situations"). At a minimum, the prima facie test in the contract-bidding context must consider whether the plaintiff submitted a "bid which met the requirements for an available contract." *Brown*, 939 F.2d at 949; *see also Cabrera v. Jakabovitz*, 24 F.3d 372, 381

(2d Cir. 1994) (holding, in the fair-housing context, that the plaintiff must have applied for, and been qualified to rent, an available apartment). The relevant circumstances that artists and managers must take into account during the bidding process include price terms, the number of shows in a particular tour, the definiteness of an offer, the proposed promoter's reputation and financial capabilities, and the artist's and management's specific bid requirements. SPA.11, 16, 18.

Accordingly, to establish a prima facie case of racial discrimination in the contract-bidding context, a plaintiff must, at a minimum, produce evidence showing that:

(1) plaintiff is a member of a protected class;

(2) plaintiff submitted a bid that met the requirements for an available contract;[21]

(3) plaintiff's bid was ultimately rejected;[22] and

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[21] Plaintiffs occasionally invoke the futility exception to excuse their failure to bid on promotion contracts, citing class-action and pattern-and-practice cases. *See* Rowe Br. 49-50. Whatever applicability the futility exception has in those contexts, it does not apply here. In § 1981 contract-bidding cases, plaintiffs are required to make bids or at least to identify the specific contracts for which they would have submitted bids, but were prevented from doing so. *See Coach Stores*, 163 F.3d at 711-12; *Morris v. Office Max, Inc.*, 89 F.3d 411, 414-15 (7th Cir. 1996).

Just as important, plaintiffs' futility argument is factually baseless. The evidence showed that each booking agency's policy was to forward all bids to the artist's management, *see, e.g.*, A.1388, 1502, and plaintiffs produced no evidence that any booking agency ever failed to forward one of their bids to an artist. A. 1488. To the contrary, there was substantial evidence that black promoters other than plaintiffs regularly placed successful bids for promotion contracts. SPA.57-58. A prominent black promoter, Al Haymon, testified that there is no way to prevent a promoter from submitting a bid. SPA. 140; A.3662-63.

[22] When, as in this case, the claims are against a defendant for precluding the plaintiff "from procuring a contract with a third party"

(4) the contract was ultimately awarded to an individual who is not a member of the protected class.

Brown, 939 F.2d at 949; *Allstate Transp. Co. v. Southeastern Pa. Transp. Auth.*, No. CIV. A. 97-1482, 2000 WL 329015, at *6-*8 (E.D. Pa. Mar. 27, 2000) (comparing different formulations of the prima facie case in the contract-bidding context and adopting *Brown*); *cf. T&S Serv. Assocs. v. Crenson*, 666 F.2d 722, 725 (1st Cir. 1981) (imposing even more rigorous prima facie requirements).

If the plaintiff fails to establish a prima facie case, the analysis ends and the defendant is entitled to summary judgment. If, however, the plaintiff makes out a prima facie case, the defendant may then produce evidence demonstrating a legitimate, nondiscriminatory reason for its conduct. *Burdine*, 450 U.S. at 254, 101 S.Ct. at 1094. This is a burden of production, not persuasion, for the plaintiff always bears the burden of persuasion. *Id.* at 255, 101 S.Ct. at 1095. Once the defendant proffers a nondiscriminatory reason for its conduct, the plaintiff must "produce specific evidence suggesting that those reasons are merely a pretext [and] that the real reason for the action [was] based on race." *Brown*, 939 F.2d at 949-50. To withstand summary judgment, the "plaintiff ha[s] to do more than establish a prima facie case and deny the credibility of defendant's witnesses." *Id.*; *Schuler v. Chronicle Broad. Co.*, 793 F.2d 1010, 1011 (9th Cir. 1986).

(the artists), the plaintiff must show that the defendant "both possessed sufficient authority to significantly interfere with the individual's ability to obtain contracts with third parties, and that the party actually exercised that authority to the individual's detriment." *Harris v. Allstate Ins. Co.*, 300 F.3d 1183, 1197 (10th Cir. 2002).

1. Plaintiffs Produced No Evidence of Discrimination by CAA.

a. Summary Judgment Was Proper on Rowe's Claims Arising from Kenny G's 1997 Tour.

Before applying the *McDonnell Douglas* framework, it is necessary to straighten out plaintiffs' twisted account of the evidence about Kenny G's 1997 tour. Rowe asserts on appeal that CAA's Mike Piranian told Rowe in October 1996 that there were no available concert dates. Rowe Br. 21-22. Plaintiffs' citation to Rowe's affidavit, A.8885, does not support that allegation, and Rowe's own responsive affidavit confirms that it was Al Haymon, not Piranian, who initially told Rowe about the tour, including the minimum guarantees demanded. SPA.138; A.5302. More important, the record shows that Piranian merely communicated the terms that Kenny G's management had demanded of *all* promoters in the fall of 1996 (minimum guarantees between $225,000 and $275,000 for major cities and a 50% deposit, SPA.139; A.5224, 8885) and that Rowe declined to make an offer for any of the available dates. SPA. 139-40; A.1377, 1412.

Next, plaintiffs inaccurately argue that Piranian offered better terms to white promoters in the fall of 1996 than he had offered to Rowe, asserting, "In reality, CAA and WMA *had offered* the usual pack of dominant white promoters minimum guarantees of $125,000-$175,000, with a 0-10% deposit." Rowe Br. 22 (emphasis added). That statement is false and lacks any evidentiary support. When Rowe made his inquiry in the fall of 1996, CAA quoted the terms Kenny G's management had demanded, offering the same terms to all

promoters. A.1376-77. As the district court observed, contemporaneous offers from white promoters matched (or even exceeded) the terms that Piranian quoted to Rowe. SPA.139. In late October 1996, Nederlander Organization, a prominent whiteowned promoter, offered a of $225,000 for a tour date, A.1377; and in August 1996, Radio City Music Hall, a white-owned promoter, contracted with Kenny G's management for six concert dates with per-show guarantees of $280,000. A.1377, 1412, 1433, 15955-68, 15979-16001. There is simply no evidence that CAA "had offered" better terms to white promoters than to Rowe. Rowe Br. 22.

In making their disparate-terms argument, plaintiffs misrepresent the chronology to claim that other promoters got better price quotes than Rowe. The district court's opinion and the record expose plaintiffs' sleight of hand. After initially requesting guarantees of over $200,000 and higher deposit terms, Kenny G's management subsequently accepted bids with lower guarantees because the concerts were not selling well and promoters were demanding lower terms, as Toni Braxton's manager and Rob Light testified. A.1412, 5225. During that period, Larry Bailey, a prominent black promoter, and other promoters secured dates at the lower amounts. A.1412, 1434-35. As the district court noted, there is no evidence that CAA gave advance notice of the more favorable terms on the basis of race, nor is there evidence showing that all white promoters were offered deposit terms between 0% and 10%. SPA.141. CAA produced 19 contracts in which white promoters paid 50% deposits, and CAA's files show that Larry Bailey, a black promoter, paid 25% deposits on two Kenny G shows in June 1997. A.16025-28.

On this record, plaintiffs fail on three of the four prima facie elements under *McDonnell Douglas*. Rowe

cannot show that he submitted a bid that met the requirements for an available contract because he did not submit *any* bids to promote any tour dates. Rowe attempts to excuse that deficiency by arguing that bidding would have been futile, Rowe Br. 47-51, implicitly suggesting nonsensically that he is somehow entitled to compensation for every concert he never tried to promote. But there is no futility exception in contract-bidding cases without evidence that defendants prevented plaintiffs from submitting bids on specific concerts, which Rowe could never show. *See PAS Communications,* 139 F.Supp.2d at 1149; *Coach Stores,* 163 F.3d at 706. As explained previously, CAA did not misrepresent the minimum contract requirements, but instead conveyed to Rowe objective selection criteria (the explicit numerical requests of Kenny G's management) to potential tour promoters and relayed all offers back to management.[23] A.1376-77. And plaintiffs' assertion that only 1.4% of promoters are black is "virtually meaningless" in making out a prima facie case or proving futility; that statistic says nothing about CAA's practices because it does not indicate how many black promoters have submitted failed bids to CAA and does not compare the relative success rates of black promoters to equally qualified white promoters. *See Brown,* 939 F.2d at 952.

Rowe also fails to show an adverse contracting decision. First, plaintiffs have not produced evidence that CAA had "sufficient authority" over Kenny G's promoter selection process to "significantly interfere with"

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[23] Plaintiffs wrongly argue that reliance on nonobjective criteria, without more, gets them to a jury. Rowe Br. 49 Nonobjective factors such as familiarity and previous contractual relationships can be legitimate nondiscriminatory reasons' for choosing one bidder over another. *Brown,* 939 F.2d at 951; *McMillian v. Svetanoff,* 878 F.2d 186, 189 (7th Cir. 1989).

Rowe's ability to obtain a contract. *Harris,* 300 F.3d at 1197. While some artists and managers may allow booking agents to participate actively in promoter selection, plaintiffs cannot use Bill Cosby's reliance on booking agents, Rowe Br. 58, to create a genuine issue of material fact about whether CAA had sufficient authority to influence Kenny G's team, who indisputably made *all* material decisions about financial demands and promoter selection. A.1376-78, 4987-88, 5212-13, 5226, 5234.

Second, ev n if CAA had possessed "sufficient authority" to "significantly interfere" with Rowe's ability to contract, there is absolutely no evidence that CAA "actually exercised that authority to [Rowe's] detriment," making summary judgment appropriate.[24] *Harris,* 300 F.3d at 1197; *see also Parent v. Credit Union One,* 792 F.Supp. 526, 527 (E.D. Mich. 1992) (holding there was no prima facie case of discrimination when the decision to reject the loan was not made by the defendant mortgage broker). CAA's role was merely to communicate bid demands from Kenny G's team, giving evenhanded quotes to all promoters who inquired, and to relay all promoter bids to Kenny G's management.[25] Third, plaintiffs cannot point to an "adverse contracting decision." Rowe never submitted bids to promote any tour date, but

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[24] Plaintiffs baldly assert that defendants " 'played a meaningful role' in the hiring of promoters generally and the exclusion of Plaintiffs specifically," Rowe Br. 59, but cite no evidence supporting either assertion.

[25] Despite unassailable evidence that Toni Braxton, as the supporting act, had no role in choosing promoters or in setting contract terms, Rowe suggests he was entitled to promote Braxton because he helped launch her career. Rowe Br. 21; A.8885 (explaining Rowe's belief that "the time came for the black promoters to reap the rewards of their investment in Toni Braxton"). But § 1981 does not make CAA responsible for vindicating Rowe's perceived property interest in Braxton's career.

instead threatened to organize a public boycott and a media smear of the tour if he and the Black Promoters Association's members were not involved. A.8885. To protect the tour from this threat, Rob Light of CAA worked out an arrangement whereby Rowe and his associates were able to participate in ten dates of the tour even though those shows had been purchased by other promoters.[26] In fact, Rowe and Light even signed a document outlining BPA's participation and acknowledging that the parties had "resolve[d] the situation regarding the KENNY G TONI BRAXTON Tour." A.1436. Because Rowe actually obtained interests in several tour contracts—ironically, thanks to CAA—and did not identify additional contracts he would have pursued,[27] he suffered no legally cognizable injury.

Rowe also loses on the fourth prima facie element. Larry Bailey, a member of Rowe's protected class, obtained numerous promotion contracts for the tour, *see, e.g.*, A.16025-28, negating any reasonable inference that racial animus motivated CAA's conduct. A § 1981 claim cannot survive summary judgment if it fails to satisfy even one element of the prima facie case. Rowe's claim fails three.

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[26] Rowe's shakedown tactics—showing initial interest in a tour, not submitting a bid, threatening public boycotts and negative publicity if not granted participation, and then accepting a coerced payoff—saw repeat performances during Janet Jackson's 1998 tour. *See infra* at 64-65.

[27] Rowe's failure to identify which contracts he would have sought is yet another basis for granting summary judgment on this § 1981 claim. *PAS Communications*, 139 F.Supp.2d at 1175-76.

b. Summary Judgment Was Proper on Rowe's Claims Arising from Janet Jackson's 1998 Tour.

When describing Janet Jackson's 1998 tour, plaintiffs again misconstrue the evidence and chronology. The undisputed evidence is that, before the tour was sold to a national promoter, Roger Davies (Jackson's manager) made all material decisions relating to the tour, including decisions about financial terms and promoter selection. SPA.142; A.1378-81, 1398. CAA encouraged Davies to involve black promoters in Jackson's 1998 tour, A.1379-80, 1398, and Light even gave Rowe advance notice of the tour and repeatedly encouraged him to submit a bid. A.1379, 1399-400, 4711-12. Based on the initial parameters set by Jackson and Davies, Light informed Rowe and other interested promoters that Jackson was seeking a $300,000 guarantee per show. A.1379-80, 1398-99.

In January and February 1998, Jackson's team received detailed bids worth at least $11 million from major national promoters, including one from Magicworks that CAA relayed to Davies. A.1379, 1399. In contrast, Rowe never submitted a bona fide bid. Rowe's first letter regarding the tour, submitted on February 10, 1998, was a self-styled "firm offer" for only 29 cities, at $300,000 per show, or $9 million in total. A.1379-80, 1399, 15307-08. CAA forwarded that letter to Davies's office. A.1399; SPA.145. Light advised Rowe to submit a more complete and definite offer.[28] A.1380, 1400. Rowe's February 20 letter was, in important ways, even

[28] Rowe originally argued that Light did not contact him after Rowe's February 10 letter. But, as the district court noted, Rowe's own letter of February 20, 1998, undercuts his position, as it indicates that Rowe and Light had a conversation following the February 10 letter. SPA. 145 n.195; A.8706.

less definite. It listed 28 "markets that we would like to be involved in" and then stated that, given the uncertainty about how the tour would be sold, "I can not discuss the financial arrangement that I am willing to make at this time." A.8706.

Magicworks, after submitting several revised proposals over a period of several months, delivered to CAA an offer containing a minimum guarantee of $ 11 million for 40 shows by Jackson, supported by Usher, with a substantial up-front cash payment ($5 million) and irrevocable letters of direction securing the remaining $6 million. A.1380-81, 1402, 15310-13, 15332-33. Intrigued by Magicworks's offer, Davies instructed CAA to inform other interested promoters that Jackson was looking for offers for 40 shows with half the guarantee up front and the remainder secured with an irrevocable letter of credit. A. 1380, 1400-01.

Light informed Rowe of Davies's parameters, indicating that Jackson had received an $11 million offer, and again encouraged Rowe to submit a comprehensive offer. SPA.146-47; A.1379-81, 1401, 8709. The March 4, 1998 confirmation facsimile from Light to Rowe set out the proposed bidding parameters and explained that "[t]he decision to use a national producer was reached over this past weekend," that "all interested parties are being given the same parameters," and that the "Artist's desire" was "to have all offers in by the close of business Wednesday, March 4, 1998." A.8709. Rowe never responded. A.1401, 4717.

The root of Rowe's complaint is that Magicworks, not Rowe, received the exclusive contract for Janet Jackson's 1998 national tour. A.141. The complaint also expresses outrage that "[s]everal of the plaintiffs" had

previously promoted Jackson, but were prevented from taking a larger role in her 1998 tour.[29] *Id.*

Rowe's prima facie failure is obvious: he did not submit *any* offer after receiving Light's letter, let alone an offer that was anywhere close to Davies's desired "basic parameters" or competitive with the Magicworks offer. Rowe's letter proposed 28 cities, not the 40 that Davies sought. A.8706-07. Even assuming he could deliver, Rowe's total guarantee was worth, at best, around $9 million; Davies sought at least $11 million.[30] Rowe's informal letters lacked essential terms—which Davies had requested—regarding production costs, advertising, and deposit terms. A.8709. A simple comparison of the proposals allays any doubt about their relative merits. *Compare* A.8627-28 *and* A.8706-07 *with* A.8711-19.

Despite Rowe's insinuations, Rowe Br. 23, Magicworks's offer and eventual contract conformed to the basic parameters of the March 4, 1998 letter, which requested 40 dates, 10 truck shows, sellable seats to 180 degrees,

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[29] It is ironic that Rowe felt entitled to promote any show by a member of the Jackson family, since the Jacksons fired him as their promoter after he stopped payment on a concert check to them in 1979. SPA.40; A.4882-83, 19200.

[30] Light's March 4 letter does not demand a $12 million minimum artist guarantee. *See* Rowe Br. 23. Instead, the record indicates that Light had advised Rowe that Jackson had an outstanding offer with an $11 million guarantee. A.1380-81. Rowe apparently manufactured the $12 million figure by multiplying Davies's *earlier* demand for $300,000 per show by 40, the number of tour dates that Davies requested (through Light) in the March 4 letter. A.8709. Plaintiffs' claim that Rowe "would have to post a full $12 million *before* the on-sale date" is also fabricated. Rowe Br. 24. The March 4 letter requested *a 50% deposit before the first sale date*, with the remaining amount secured by a letter of credit. A.8709. Given that Magicworks's competing bid was $11 million (and that Rowe was aware of that amount), the most Rowe would have been required to deposit was $5.5 million.

support paid for and contracted by the producer, advertising terms, and a term ensuring black representation. A.8709, 8713-19, 15302-05. Indeed, the deposit term in Magicworks's deal memorandum was arguably more favorable to Jackson than the term her manager had proposed because it offered an upfront payment of $3 million and an additional $2 million no later than 24 hours before the first on-sale date. A.8713-14, 15302-03. Those payments were not merely "guarantees," as plaintiffs mistakenly state. Rowe Br. 24. The $5 million up front was a huge benefit because, unlike deposits, which typically are held in escrow, Jackson had immediate access to the $5 million, even before the sale of a single ticket. A. 1402. The remaining $6 million was guaranteed by irrevocable letters of direction for the venues to withhold the first $150,000 in revenues from each concert. *Id.;* A.8714. Rowe had the opportunity to make an offer, negotiate terms, or submit a counteroffer to Davies's requests in the March 4 letter. He did none of those things.[31] Thus, because Rowe proffers no valid excuse for failing to submit a bid, he cannot satisfy his prima facie burden.

Rowe cannot show an adverse contracting decision because there is no evidence showing that CAA had "sufficient authority" to "significantly interfere" with Rowe's ability to contract with Jackson's team, much less that CAA "actually exercised" its authority to

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[31] No evidence supports Rowe's insinuation that CAA purposely delayed relaying Davies's basic demands. Rowe Br. 23. As the March 4 letter itself confirms, Jackson's team had just made the decision to use a national promoter, A.8709, and other evidence shows that the basic parameters were still not finalized as of March 3, 1998. SPA. 150. In any event, plaintiffs cannot raise an inference of race-based discrimination, because they cannot show that any similarly situated nonminority individuals were treated differently. SPA. 150.

Rowe's detriment. *Harris,* 300 F.3d at 1197. The decision of which promoter to select always belonged to Jackson and her management. A.1378, 1398; SPA.17, 142. There is no evidence that CAA failed to communicate Rowe's offers to Jackson's management. Further, Tom Ross, the former head of CAA's music department, recommended to Jackson's attorney that Jackson would be better served by using individual promoters and not a national promoter, such as Magicworks, A.1401, a recommendation that would have favored Rowe's position, not Magicworks's.

Rowe's claim is a nonstarter that fails to satisfy at least two elements of *McDonnell Douglas's* prima facie case. But even if plaintiffs had satisfied their initial burden, summary judgment was still proper because CAA proffered legitimate explanations why Magicworks received the contract instead of Rowe. First, Magicworks's bid was superior to Rowe's—the paradigm example of a legitimate, nondiscriminatory explanation for an adverse contracting decision. *T&S Serv. Assocs.,* 666 F.2d at 726-27. Second, there is no evidence that CAA advocated against Rowe's "bid" to Jackson's management, but even if there had been, CAA would have been justified in counseling Jackson's team to avoid choosing Rowe as the national promoter based on Rowe's financial and legal troubles and prior poor performance for the Jacksons. *See* A.19202-04. Third, Rowe did not have a reputation as a national concert promoter, as prominent black promoters confirmed in their testimony.[32] A.17560-62. Once Jackson's team decided to seek a national promoter, CAA would have been justified in telling them Rowe lacked a reputation as a national promoter. *See Brown,* 939 F.2d at 951. Rowe failed at the summary-

[32] Rowe has not been the principal promoter in a major national concert tour since the mid-1980s. A.4386-87.

judgment stage to produce "specific evidence" that CAA's proffered reasons for any adverse contract decision against Rowe were pretextual. *Burdine,* 450 U.S. at 256, 101 S.Ct. at 1095.

Plaintiffs improperly try to connect another incident to Jackson's selection of Magicworks as the national promoter. Carole Kinzel's note, A. 15795, which the plaintiffs continually emphasize (and underline and put in bold), Rowe Br. 5, 24, 26, had nothing to do with the selection of Magicworks. Kinzel's handwritten note was written much later and in a completely different context, as Kinzel's unrefuted declaration clearly explains. A.8600-04.

After Jackson's tour had already begun, Jackson's team and Magicworks decided to book "filler" dates in markets that had not initially been scheduled. A.8601. Jackson's management discussed with Kinzel the possibility of adding another West Coast stop. A.8602. Larry Bailey, a prominent black promoter, expressed interest in promoting a show in Fresno as a filler date, *id.*, but he worried that Fresno was an untested secondary market and was concerned about his possible risk exposure, especially since ticket sales had been lackluster in some other cities. A.8601-02. Davies asked Kinzel to explore with Bailey "what business" they could expect to do in Fresno and "also told [her] to make sure that Mr. Bailey and [she] did not tell *anyone* that Mr. Bailey's guarantee would be sign ficantly lower than the guarantees other promoters had paid or were paying for previously booked dates, including other black promoters who were involved with the tour." A.8603. Rowe and the Black Promoters Association had already threatened to picket the tour, and Dan Zelisko, a white promoter who was promoting a concert in Phoenix around the same time, had already complained to Davies about

the amount of his guarantee. Thus, Kinzel wrote: "Not divulge guarantee re Black promoters + Dan Zelisko," A. 15795, 8602-04, to record that Davies did not want to give any promoters—including white promoter Dan Zelisko and the BPA members who had already made threats—an excuse to complain about the concession granted to black promoter Bailey. A.8603-04. Divulging Bailey's low minimum guarantee would undermine Davies's bargaining position for future filler and resale dates. *Id.*

Neither the note nor Kinzel's unrebutted explanation give rise to any inference of race-based discrimination, but instead reveal legitimate business reasons for keeping Bailey's terms a secret. And, at bottom, the incident does not even disclose a prima facie case of race discrimination. Kinzel's allegedly discriminatory note had no connection to any specific adverse contracting decision by CAA. *Gold Star Taxi & Transp. Serv. v. Mall of Am. Co.*, 987 F.Supp. 741, 746-47 (D. Minn. 1997); *PAS Communications,* 139 F.Supp.2d at 1175-76. Rowe and the other plaintiffs did not specify Fresno as a contract that they would have sought. *Id.* Bailey is a member of the plaintiffs' protected class. And the plaintiffs have not shown that they were treated differently than similarly situated white promoters such as Dan Zelisko, defeating an inference of race-based discrimination. The fact that plaintiffs left Zelisko's name out of their description of Kinzel's letter implicitly acknowledges that the memo, as written, does not support their claim.

Plaintiffs also allege that, after Magicworks became the national promoter, CAA discriminated against them by refusing them promotion opportunities for individual tour dates. But the unrefuted record evidence reveals plaintiffs' conduct for what it was: a shakedown. CAA, through Rob Light, actively encouraged involvement of

black promoters in Jackson's tour and ultimately brokered a deal ensuring plaintiffs' participation in several dates. A.1398, 1402-05. During initial conversations about the tour, Light mentioned to all prospective buyers that Jackson wanted to have black representation in the promotion of her concerts. A.1398. Consequently, Magicworks's contract contained a provision requiring Magicworks to "meaningfully involve black promoters" in the tour. A.1402. Light contacted African-American promoters Billy Sparks and Quentin Perry to assist in marketing the tour with Magicworks, and based on Light's recommendation, Magicworks hired them as marketing consultants for the entire tour. A.1403. Perry also copromoted several dates on the tour. *Id.*

After Magicworks acquired the tour, Light put Rowe in contact with Magicworks to discuss potential opportunities to promote individual shows. A.1402. On several occasions in March 1998, Brad Wavra from Magicworks invited Rowe and other BPA members to make concrete offers for any show. A.1459, 1463, 1467. But none of the plaintiffs submitted a bid in response to those invitations. A.1403. Instead, resorting to his preferred modus operandi, Rowe sent a letter on behalf of the BPA calling the tour racist and warning that the BPA was considering organizing a media smear campaign and public boycott of the tour. A. 1460-62, 1403. Wavra responded the same day, informing him that Magicworks had hired Perry and Sparks as marketing consultants for the tour and again inviting BPA members to submit bids for any shows. A.1404, 1463.

Finally, Jesse Boseman sent a letter to Magicworks on April 1998, offering $400,000 per show for two dates at Madison Square Garden. A.1464. Boseman's one-page offer included no other necessary deal terms, just a memo accusing Jackson of "double crossing" the

African-American community and threatening to organize a boycott of the tour. *See* A. 1465-66. In response, Wavra assured Rowe and the BPA that the accusations of discrimination were "unfounded," explained steps that Magicworks had already taken to involve African-American promoters and urban communities in the tour, and again invited BPA members to submit concrete offers for any market. A. 1467-69.

Around April 6, 1998, Rowe presented written proposals for the BPA to participate on a one-third basis in Jackson's show in Washington, D.C. and on a one-half basis in Los Angeles. A.1471, 1473. Light persuaded Magicworks to involve Rowe and the BPA in both markets in the hopes of avoiding picketing and disruption of the tour. A.1404-05.[33] Light also made arrangements for Sparks and Perry to pay Rowe and the BPA $100,000 out of their consulting fees. A.1405.

It was in reference to this situation—the Black Promoters Association's unjust threats to sabotage Jackson's tour—that Carole Kinzel wrote the memo about the "Black Promoter Issue," explaining that "Rob Light kept this situation under control" and prevented the BPA's threats from halting the tour. A.8605-06, 15717-18. Contrary to plaintiffs' false but imaginative story, Rowe Br. 26, the "Black Promoter Issue" had nothing to do with

[33] Plaintiffs' assertion that Magicworks unlawfully discriminated against plaintiffs by offering better terms to white promoters is meritless. Plaintiffs point to several promotion contracts that accepted lower guarantees and deposit terms than those suggested in Magicworks's March 16 letter. Rowe Br. 25-26. But every single one of the contracts cited by plaintiffs was the product of negotiation; each was signed more than two months after Magicworks's initial March 16 letter; and most offered more favorable back-end splits to Jackson than the initial quote to Rowe (85% to 90% rather than 75%). *Compare* A.1459 *with, e.g.*, A.12758-59, 12762-64, 12767, 12771, 13046-47, 13049, 13058-59.

the rejection of Rowe's bid for the national tour, as Kinzel's declaration and the note itself (when read in its entirety) both make clear. *Id.;* A.8605-06. Rather than providing evidence of discrimination, Kinzel's memo is another reminder of plaintiffs' practice of resorting to shakedown tactics.

Summary judgment on plaintiffs' Janet Jackson claims was proper for several independently sufficient reasons: plaintiffs failed to submit timely bids to Magicworks for promotion dates; Magicworks, not CAA, was the decisionmaker in awarding promotion contracts for individual shows, and CAA never took any action detrimental to them; and, thanks in part to CAA's influence, plaintiffs suffered no cognizable injury because they obtained promotion contracts and fees for the tour.

2. Plaintiffs Produced No Evidence of Discrimination by WMA.

a. The Majority of the §1981 Claims Against WMA Have Now Been Abandoned.

On appeal, plaintiffs have abandoned and are no longer pursuing several claims initially asserted against WMA, including (1) Rowe's and Boseman's claim relating to Toni Braxton concert dates, SPA. 108-10; (2) Rowe's claim relating to the 1998 Maxwell tour, SPA.110-13; (3) plaintiffs' claim relating to Erykah Badu's alleged 1998 tour, SPA.119-20; (4) plaintiffs' claim regarding the Temptations and other black artists represented by WMA, SPA.120-22; and (5) Boseman's and Rowe's claim relating to Lauryn Hill's concert dates in 1999, SPA. 122-24. In their brief, plaintiffs do not challenge the propriety of the district court's dismissal of these claims or the court's findings upon which the dismissals

were predicated. Consequently, the dismissal of these claims against WMA requires no further discussion.

b. Summary Judgment Was Proper on Rowe's Claim Against WMA Regarding the 1999 Maxwell Tour.

With respect to the artist Maxwell, the amended complaint alleged that "[a]fter this action was filed," WMA and other defendants allegedly "excluded plaintiffs from bidding on the contracts for the promotion of the concerts on the 1999 tour given by Maxwell." A.135-36. Defendants were also alleged to have engaged Magic Johnson Productions (MJP) to promote the Maxwell 1999 tour in order "to create the false illusion that defendants ha[d] engaged a black promoter." *Id.*

Confronted with the undisputed evidence demonstrating that certain of the plaintiffs had, in fact, bid to promote individual concert dates on the 1999 Maxwell tour, plaintiffs then abandoned the frivolous "exclusion" claim on summary judgment.[34] Although Rowe did not dispute his failure to submit a bid for any concert dates on the 1999 Maxwell tour, A.17485, 18163, he nevertheless continued to press the Maxwell false-exclusion claim on summary judgment. Based on the undisputed facts, the district court concluded that Rowe failed to establish any prima facie case of racial discrimination by WMA because, among other reasons, (1) neither Rowe

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[34] The evidence, for example, showed that Boseman had submitted a bid and had, in fact, copromoted a Maxwell concert date in 1999 in Virginia. SPA.69. Jones had submitted a bid to promote Maxwell on September 16, 1999, in Nashville "if Maxwell performed there," but Maxwell did not perform in Nashville in 1999. SPA.114. King testified that he did not submit a bid, not because he was "excluded" from doing so, but because he had no interest in promoting Maxwell in 1999. A.17485, 18162-63.

nor Rowe Entertainment ever bid on the 1999 Maxwell tour, SPA.114; (2) Maxwell and his manager, Randy Hoffman, *not* WMA agent Jeff Frasco, "made the selection of MJP as the Maxwell tour promoter and of the local promoters for Maxwell's 1998 and 1999 tour engagements," SPA.114-15; and (3) instead of Rowe, another black promoter (Magic Johnson) was hired by Maxwell and his manager as the national promoter for the 1999 Maxwell tour. SPA.113-15.

Plaintiffs do not challenge the district court's conclusion that Rowe failed to establish a prima facie case of intentional discrimination against WMA. Rather, in a vain effort to create the false appearance of disputed fact issues, plaintiffs argue, without the benefit of any evidence, that (1) Magic Johnson was allegedly "inserted" in the Maxwell tour by WMA as a "token" black promoter "after" WMA had "first inserted white-owned promoter firms from its 'good old boys' network' to run each stop of the [Maxwell] tour"; and (2) Magic Johnson's company allegedly lacked "the power to choose its local co-promoters" and was just "paid to lend its name and help silence critics of the booking agency defendants' discriminatory practices." Rowe Br. 6, 27-28. As with plaintiffs' other irresponsible and unsubstantiated allegations against WMA, not a shred of evidence exists to support any of these unfounded accusations.[35] Plaintiffs' assertions fly in the face of Magic Johnson's own sworn testimony, A.3786-89, and are based solely on

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[35] Similarly, there is *no* record substantiation for the other speculative assertions in plaintiffs' brief relating to the Maxwell tour, including the claims that (1) WMA was "[u]nder pressure to hire a black promoter for a national tour"; (2) Magic. Johnson was a "WMA client"; and (3) Rowe discussed with Magic Johnson "Johnson's plans to make extensive use of black co-promoters throughout the United States." Rowe Br. 27.

Rowe's rank speculation, A.8880-81, and a blatant mischaracterization of various documents (including a draft tour schedule dated 8/5/98), which plaintiffs submitted in opposition to WMA's summary-judgment motion without any accompanying testimony or evidentiary foundation.[36]

It is abundantly clear that Rowe failed to satisfy not just one, but three out of the four elements of *McDonnell Douglas's* prima facie case because (1) Rowe did not submit a bid to promote any of the dates on the Maxwell 1999 tour, SPA. 114; *Brown,* 939 F.2d at 949; PAS *Communications,* 139 F.Supp.2d at 1173;[37] (2) Rowe did not

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[36] Nothing in WMA's draft tour schedule dated 8/5/98, A.14879, substantiates Rowe's assertion that WMA "pre-sold" various venues or shows to unnamed "dominant white promoters" before Maxwell and his management retained Magic Johnson's company as the national promoter for the 1999 tour. *See* A.8880. Indeed, the district court explicitly found that Rowe's claim was "misleading" because it was belied by the evidence. SPA.67 n.104.

[37] Plaintiffs' assertions, Rowe Br. 28, that "in both New York and Los Angeles, Rowe outbid the winning bidder by 25%, and his opening bid tied the winning bid in Chicago, Detroit and Atlanta" are frivolous. As a threshold matter, Rowe's self-proclaimed "firm offer" was made in July of 1998, the year that Maxwell did not perform. Thus it is meaningless to compare Rowe's "offer"—which did not contain *any* detailed financial terms (not even the proposed guarantee or the proposed artist-promoter split)—to the so-called "winning" bids made and accepted a year later in 1999 for specific dates and venues and containing detailed financial arrangements. Second, plaintiffs do not even accurately describe their own meaningless comparison. Instead, they disingenuously compare Rowe's July 20, 1998 "offer," A.2179, with some of the bids reflected in WMA's draft tour schedule for August *1998,* A.2180-81, and not with the successful bids for the Maxwell tour in *1999. See* Rowe Br. 28. The district court also found that Rowe's attempted comparison was improper, not only because Rowe's offer was for 1998 and did not "contain proposals for the artist/promoter split, venues, venue capacity or ticket price" but also because WMA's draft tour schedules did "not reflect MJP's

suffer an adverse contracting decision because it was undisputed that Maxwell and his manager, not WMA, made the concert promoter selections for the 1999 Maxwell tour, SPA.114-15; *Parent*, 792 F.Supp. at 527; *PAS Communications*, 139 F.Supp.2d at 1170-71;[38] and (3) Magic Johnson, a member of Rowe's protected class, was retained by Maxwell and his manager as the tour promoter for Maxwell's 1999 tour. SPA.114-15; *see Brown*, 939 F.2d at 949 (to establish a prima facie case under § 1981 for contract discrimination, plaintiff must show that the contract was "eventually given to an individual who is not a member of [plaintiffs'] protected class"). In addition to Magic Johnson's company, numerous other black promoters were retained in local markets to copromote concerts on Maxwell's 1999 tour, including Bill Washington, who copromoted nine shows; Lionel Bea, who copromoted two shows; Clarence Jones, who copromoted two shows; and Boseman, who copromoted one show. SPA.114-15.

The district court thus correctly concluded that no reasonable jury could infer that WMA intentionally discriminated against, or interfered with, any of the

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advance of $350,000 or the guarantees of the local promoters for the 1999 tour." SPA.114.

[38] Further, plaintiffs presented absolutely no evidence to show that any action taken by WMA or Frasco was motivated by racial animus against Rowe. *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993) (under § 1981, plaintiff must prove that the alleged conduct was racially motivated and purposefully discriminatory). Plaintiffs themselves testified that they did not regard Frasco as a racist and that Frasco had never made any racially derogatory remarks in their presence. A.17479, 18152. Moreover, a parade of black promoters testified that they conducted a substantial amount of business with Frasco and had positive business relationships with him that stretched back for decades. A.17479.

"Plaintiffs in making a contract" because of their race in violation of § 1981. SPA.115.

c. Summary Judgment Was Proper on Boseman's Claim Against WMA Regarding the 1997 Badu Tour.

While plaintiffs' brief does not recite the record evidence underlying Boseman's claim, the material facts are straightforward and undisputed. At his deposition, Boseman testified that he called WMA's Cara Lewis in January 1997 and asked to promote Erykah Badu in New York City at one of two large venues. SPA.116; A.3271-73. Boseman testified that Lewis told him that Badu was not scheduling dates at that time. SPA.116; A.3273-74. Boseman further claimed that, in late March 1997, almost three months later, a "white" promoter called Lewis and was told that Badu was going to perform but that the venue and dates had not been decided. SPA.116-17; A.3279-80.

Lewis testified that Boseman had inquired about promoting Badu and that she told Boseman that management was seeking to have Badu perform only at small "clubs," not large venues as Boseman had suggested. SPA.117; A.1511, 4208. Lewis also testified that, in January 1997, the statement that Badu was not currently scheduling performances was correct. SPA.117; A.1511. Indeed, as plaintiffs themselves admitted and as the documentary evidence showed, Badu gave no performances in January, February, or even March of 1997. SPA.118; A.17486, 18163. Badu's first appearances in 1997 did not take place until April. SPA.118; A.17486, 18163. When Badu did perform in April 1997, her engagements were promoted by black promoters. A.17486, 18163.

On appeal, plaintiffs do not dispute that Badu did not perform at either of the two venues Boseman inquired

about, A.17486, 18163, or that Boseman never submitted a bid to promote Badu and, thus, cannot establish a prima facie case of intentional discrimination as a matter of law. Plaintiffs nevertheless continue to assert—as a "claim"—that Lewis allegedly lied in January 1997 by telling Boseman that "Badu was not going out" on tour. *See* Rowe Br. 29, 50; A.8900. Boseman's assertion that Lewis lied is based solely on his speculation that "[c]ontracts are often made ninety days in advance of the date of engagement . . . and it is highly unlikely that WMA had no inkling in January that Badu . . . would be going out on tour . . . . I knew; surely Badu's own agent knew as well." *See* A.8900. Boseman's rank speculation is not evidence.

Dispositively, not a shred of evidence was proffered below to show that Boseman's "assumption" was accurate or that in January 1997 Lewis gave different information to other promoters, black or white. Indeed, Boseman did not present testimony from a single individual (such as Badu or the promoters who promoted her concert dates later in the year) to contradict Lewis's testimony that Badu was not planning tour dates in January 1997. Boseman's assertion that a jury issue is created because he "believes" that Lewis lied is patently insufficient as a matter of law. *Berman,* 986 F.Supp. at 200 ("Simple hope that a jury will not believe the testimony of defendants that has been submitted in support of a summary judgment motion will not defeat the motion where there has been no affirmative evidence submitted to counter the defendants' evidence.").

In addition, as the district court concluded, SPA.118 n.162, Boseman's claim fails because he did not identify a specific Badu concert contract he would have bid on in 1997 and would have been awarded, absent the alleged

discrimination.[39] *PAS Communications,* 139 F.Supp.2d at 1172 (dismissing plaintiffs' § 1981 claim on summary judgment when none of the "plaintiffs [had] identified] a specific contract that they should have been or would have been awarded absent defendant's alleged discrimination"); *Coach Stores,* 163 F.3d at 711 (rejecting plaintiff's futility assertion because, even if it would have been futile for her to apply for a specific position, plaintiff "failed to allege the specific positions to which she would have applied had the alleged discriminatory practices not existed"). Considering Boseman's very limited promotional experience, SPA.52-53, and his failure to identify any specific concert engagement he was allegedly denied because of his race, a trier of fact would be left to speculate hopelessly as to which concert engagement Boseman would have been awarded absent the purported discrimination. Such speculation is not permitted, and Boseman's claim fails as a matter of law. *See PAS Communications,* 139 F.Supp.2d at 1172.[40]

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[39] As plaintiffs themselves admitted, Badu made only two appearances in New York City in 1997, one at the Supper Club and another at Tramps. SPA.118; A.17486, 18164. Because both of these small clubs are exclusively booked inhouse by the building itself, *no* independent promoter—including Boseman—could have promoted Badu at either of those venues. A.1512; *see also* SPA.118 n.161.

[40] Boseman also submitted no evidence from which one could reasonably infer that any of Lewis's actions was motivated by racial animus against him. *See Lizardo v. Denny's, Inc.,* 270 F.3d 94, 101 (2d Cir. 2001) (court must examine entire record to determine whether plaintiff has satisfied ultimate burden of persuasion that defendant intentionally discriminated against plaintiff). Like the other three plaintiffs, Boseman readily admitted that Lewis never made any racial slurs or racially derogatory statements in his presence. A.17479. And no plausible inference of racial discrimination can be drawn because it is undisputed that other black promoters actually promoted a substantial number of Badu's concerts in 1997. A.1512, 17487.

d. Jones's Claim Against WMA Regarding James Taylor Was Properly Dismissed.

Plaintiffs brashly argue without record citations that the evidence they "adduced" concerning the Mud Island incident supports Jones's claim that WMA allegedly "stripp[ed]" him of an "already contracted-for James Taylor concert that was set for Mud Island and instead, direct[ed] that concert to Beaver." Rowe Br. 68-69. The evidence is completely to the contrary.

It is undisputed that the letter from Sheldon Schultz (James Taylor's agent at WMA) to Susan Green, A.16400, communicating Taylor's decision to cancel his June 1998 performances at Mud Island was sent on April 17, 1998, three days before Jones announced his pending exclusive contract with Mud Island and three days before Barry Leff's letter to the Memphis Park Commission. SPA. 125; A.16392. Green, a former vice-president of Mid-South Concerts, had been hired by Beaver following Kelley's death to run Beaver's new office in Memphis. SPA.125. As the uncontradicted evidence demonstrated, Taylor and his management team directed Schultz to have Beaver promote Taylor's concert at the Mid-South Coliseum because (1) Kelley's death left Taylor with no promoter to promote his appearance at Mud Island; (2) Beaver was scheduled to promote Taylor's appearance in Little Rock on June 20, 1998, just three days before his planned appearance on Mud Island; and (3) Kelley's employees at Mid-South Concerts, who would have been involved in the Mud Island promotion, were being hired by Beaver, whose principal, Don Fox, was a long-time friend of Kelley. SPA.126; A.16392.

At the time of Schultz's April 17, 1998 letter to Green, it is undisputed that Schultz had had no prior dealings with Jones, did not know who Jones was, and was not

aware that Jones and Kelley were business partners in Memphis-based Island Events or any other entity. SPA. 126, A.16390-92. Nor was Schultz aware that Jones hoped to obtain an exclusive contract for Mud Island and did not learn of Jones's "plan to do so and his relationship with Bob Kelley until sometime after April 21 or 22, 1998," when Schultz received an unsolicited fax from Jones stating that "[a]s of today, my company Summitt Management Corporation, will exclusively book the [Mud Island] amphitheater." A.16392, 16402.

Contrary to plaintiffs' assertion that Jones had already contracted fo a James Taylor concert, Rowe Br. 68, the district court found that, at the time of Kelley's death, no written contract between "Mr. Taylor and Island Events or Mid-South Concerts had been prepared or negotiated," and that Schultz and Kelley had only an oral understanding that Taylor intended to appear at Mud Island on June 23 and 24, 1998. SPA.126-27; A.16391-92. Even Jones admitted at his deposition that Island Events did not have a contract for Taylor to perform at Mud Island. A.3908.

Based on the undisputed evidence, the district court properly concluded that Jones failed to establish a prima facie case of discrimination against WMA "in relation to the alleged switching of promoters for the Taylor concerts" because, although there was an oral understanding that Taylor's concerts would be promoted by "Mr. Kelley," there was no written contract between Island Events and Taylor. SPA.127. The court found that plaintiffs had offered absolutely no evidence to show that WMA or Schultz was even aware of "Mr. Jones's intention to promote shows at Mud Island before Mr. Jones's April 21, 1998 fax," *id.*, *a* finding that plaintiffs do not challenge on appeal. The district court further concluded that, even if Jones had established a prima facie case,

WMA had presented "a good business reason for its action since its principal, Mr. Taylor and his management, decided to hire Beaver," and that plaintiffs had offered absolutely no evidence "to show that this business reason for WMA's action was a pretext. *Id.*

On appeal, plaintiffs criticize the district court *only* for considering Schultz's alleged "hearsay declaration" to the effect that Taylor and his manager had requested the change in promoters. Rowe Br. 69. But Schultz's affidavit testimony, A.16392, was clearly offered to show nondiscriminatory intent and was not hearsay.[41] In any event, plaintiffs never objected or moved to strike Schultz's testimony as hearsay and have thus waived any such evidentiary objection on appeal. *See* FED. R. EVID. 103(a)(1) (on appeal, error may not be predicted upon a ruling that admits evidence unless "a timely objection or motion to strike appears of record"). Moreover, plaintiffs' argument is immaterial because Jones's failure to establish a prima facie case of intentional discrimination mandated the dismissal of Jones's claim against WMA as a matter of law.

3. Plaintiffs Produced No Evidence of Discrimination by Renaissance.

The amended complaint did not plead any specific act of discrimination against plaintiffs by Renaissance, and none was identified in opposition to Renaissance's summary-judgment motion. Indeed, plaintiffs' sole mention

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[41] Schultz's testimony was not hearsay because it was not offered for its truth (i.e., the truth of the direction received from the client), but to show Schultz's state of mind and that he had received such a direction. *See, e.g., Luckie v. Ameritech Corp.*, 389 F.3d 708, 715-16 (7th Cir. 2004); *Cameron v. Cmty. Aid for Retarded Children, Inc.*, 335 F.3d 60, 66 n.2 (2d Cir. 2003); *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1456 (9th Cir. 1983).

on appeal of Renaissance in connection with their § 1981 claims is a false, unsupported assertion that plaintiff Jones purportedly sent Renaissance a letter concerning his arrangement to book the Mud Island Amphitheater. Rowe Br. 31. No record evidence supports this assertion. To the contrary, Jones explicitly testified that he did not send the referenced letter to Renaissance, and there was no copy of that letter to Renaissance in the record. SPA.97 n.133. Plainly, the district court's judgment in Renaissance's favor on plaintiffs' § 1981 claims should be sustained.

III. The District Court Correctly Granted Summary Judgment on Plaintiffs' Antitrust Claims Because Plaintiffs Failed to Show Antitrust Injury or an Antitrust Violation Under the Rule of Reason

As shown above, plaintiffs' antitrust claims under Section 1 of the Sherman Act fail because of the absence of any direct or indirect evidence of any conspiracy by the defendants. In addition, plaintiffs' antitrust claims fail for the following independent reasons.

A. Plaintiffs Failed to Show Antitrust Injury.

To survive summary judgment on their § 1 claim, plaintiffs had to show not only that the defendants engaged in an anticompetitive conspiracy (which they utterly failed to do), *see supra* at 26-29, 32-34, but also that they, the plaintiffs, were actually injured by that conspiracy. *See, e.g., Maric v. St. Agnes Hosp. Corp.*, 65 F.3d 310, 313 (2d Cir. 1995) ("In order to defeat a motion for summary judgment, [the plaintiff] must create a genuine issue of material fact that . . . the violation caused him actual injury."). Additionally, plaintiffs had

to show that any injury they suffered was "antitrust injury," that is, injury caused by harm to competition in the relevant market.[42] *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697 (1977) ("Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." (emphasis added)); *Ezekwo v. Ain. Bd. of Internal Med.*, 18 F.Supp.2d 271, 278 (S.D.N.Y. 1998) ("[V]ital to any antitrust claim is the allegation that the defendants' conspiracy or illegal contract has caused injury to competition."), *aff'd*, 173 F.3d 844 (2d Cir. 1999). Yet plaintiffs failed to show either that they were injured by the purported conspiracy or that the alleged conspiracy caused any antitrust injury.

Plaintiffs submitted no expert testimony to support their claimed antitrust injury. Instead, plaintiffs' only expert witness who offered testimony as to damages specifically disclaimed any knowledge about, and declined to opine on, plaintiffs' damages as a result of defendants' alleged antitrust violations. A.3770. More important, under plaintiffs' own antitrust theory, it would be logically impossible for them to have suffered injury from the alleged anticompetitive conspiracy. According to plaintiffs' complaint, the alleged territorial-allocation conspiracy raised prices for promotion to

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[42] Plaintiffs' obligation to show antitrust injury exists regardless of whether their claims are evaluated under the *per se* rule or the rule of reason. *See Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341-42, 110 S.Ct. 1884, 1893 (1990) ("The *per se* rule is a method of determining whether § 1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury."); *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 909 n.15 (6th Cir. 2003) ("Our conclusion that the Agreement was a *per se* illegal restraint of trade does not obviate the need to decide whether the plaintiffs adequately alleged antitrust injury.").

an anticompetitive level.[43] *See* A.131. Plaintiffs therefore lack standing to challenge the alleged conspiracy because, as competitors of the allegedly conspiring promoters, they would benefit, not suffer, from higher promotion prices.[44] A.16054; *see Matsushita,* 475 U.S. at 583, 106 S.Ct. at 1354 ("[R]espondents cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, actually *benefit* competitors by making supracompetitive pricing more attractive.").

B. The Proper Standard to Apply to Plaintiffs' Antitrust Claims Is the Rule-of-Reason Standard, Under Which Plaintiffs' Claims Indisputably Fail.

Because plaintiffs produced no evidence that would allow a rational finder of fact to conclude that the defendants had conspired to do anything, their protestations that the district court applied the incorrect legal standard are beside the point. *See, e.g., Bogan v. Hodgkins,* 166 F.3d 509, 513-15 (2d Cir. 1999); *Capital Imaging Assocs.,* 996 F.2d at 543. Independent action is subject to neither per se nor rule-of-reason analysis under § 1 of the Sherman Act. *See Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 767, 104 S.Ct. 2731, 2739-40 (1984).

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[43] This is assuming that the defendant promoters had sufficient market power to allow them to charge anticompetitive prices, which in fact they do not. *See infra* at 84.

[44] Plaintiffs have abandoned their claim of a group boycott by failing to raise it in their opening brief, so their claims of antitrust injury must stand or fall based on their territorial-allocation theory.

It bears noting, however, that plaintiffs are wrong to contend that a *per se* analysis should apply to their antitrust claims against the booking-agency defendants. Horizontal territorial allocation is a *per se* violation, but vertical territorial allocation is not—it is subject to the rule of reason. *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 59, 97 S.Ct. 2549, 2562 (1972). So, if there were any probative evidence that any booking agency had allocated business between promoters by territory (and there is absolutely none), that conduct would be subject to rule-of-reason, not *per se*, analysis.

Notably, the evidence on which plaintiffs most heavily relied to support their antitrust-conspiracy claims—such as the territory memo by an unknown author, the letters from WMA Agent Shelly Schultz about the promotion of the Culture Club concert in San Francisco, Richard Johnson's affidavit, and the letter from Rob Light to Mitch Delsener, *see* SPA.30-35-only concern vertical relationships between individual booking agencies and individual promoters.[45] Even if those isolated documents were sufficient to raise a genuine factual issue as to the existence of an agreement between a particular booker and promoters to allocate territories (and, again, they are not), that would be a vertical-territorial-allocation agreement subject to rule-of-reason analysis. *Sylvania*, 433 U.S. at 59, 97 S.Ct. at 2562.

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[45] Plaintiffs allude to only one piece of evidence of a purported agreement between individual promoters: the statement by a Beaver employee that it had stayed out of the Memphis market because of its relationship with promoter Bob Kelley. Rowe Br. 80. This, plaintiffs claim, "is evidence from which a juror reasonably could infer that Mr. Kelley and Beaver had an argument [*sic*] to allocate the Memphis concert market." *Id.* That statement does not raise a genuine issue of material fact as to the existence of a nationwide horizontal conspiracy among concert promoters to allocate markets.

Under a rule-of-reason analysis, plaintiffs' claims undisputedly fail. The district court's careful analysis demonstrates the numerous deficiencies in plaintiffs' claims under the rule of reason, SPA.29-41, and plaintiffs have not even attempted to challenge the district court's rule-of-reason analysis on its own terms, because it would be impossible for them to do so.

Indeed, plaintiffs did not introduce any evidence to show harm to competition. First, they failed to produce any evidence to support their claimed definition of the relevant market—national concert promotions in venues with 3,000 or more seats. SPA.26; *see Ezekwo*, 18 F.Supp.2d at 278. And they also failed to produce any evidence showing that either the promoter defendants or booking-agency defendants had sufficient power in the relevant market to be able to raise prices to an anti-competitive level and thereby harm competition. SPA.26.[46] Instead, defendants' expert gave unrebutted testimony that the promoter defendants' market share was too small to allow them to charge anticompetitive prices even if they had engaged in the alleged conspiracy and that plaintiffs' market share was too small for there to be any harm to competition even if they had been totally excluded from the market. A.2812-13, 2821-22. That unrebutted evidence conclusively established that the alleged conspiracy could not have caused "antitrust

[46] The figures identified by plaintiffs as defendants' market shares were 3% for the promoters' share of the national promoting market and 42% for the booking agencies' share of the national booking market. *Id.* Those figures are too small to demonstrate sufficient market power to cause harm to competition. Moreover, the district court also found that the extrapolation by plaintiffs' counsel from which those figures were taken could not be considered as evidence because the extrapolation was never offered into evidence and was not supported by any expert testimony. SPA.26. Plaintiffs' brief does not challenge that evidentiary ruling.

injury" to plaintiffs. *See, e.g., Balaklaw v. Lovell,* 14 F.3d 793, 801 (2d Cir. 1994) (mere loss of contracts by individual competitors without significant market share is not actionable under the antitrust laws); *Capital Imaging Assocs.,* 996 F.2d at 547 ("with . . . *de minimis* market share [defendants] lack the power to injure competition").

CONCLUSION

For these reasons, the booking-agency defendants request the Court to affirm the judgment of the district court.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7).

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 20,555 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word XP in Times New Roman font size 14.

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CERTIFICATE OF SERVICE

I certify that on July 27, 2005, I sent Booking Agency Appellee's brief by Federal Express overnight mail for filing with the Court and that two copies of the brief were served in the same manner on all counsel of record:

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant Jam Productions, Ltd. states that no parent corporation and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF JURISDICTION

Plaintiffs' statement of jurisdiction is not correct and complete with respect to Defendant Jam Productions, Ltd. ("Jam"). The Final Judgment for Jam was entered on February 10, 2005. (Special Appendix, pp. SPA-175 to SPA-176). Jurisdiction in the Court of Appeals is permitted pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the District Court properly grant Jam's motion for summary judgment on Plaintiffs' claim that it violated their civil rights by allegedly refusing to co-promote white acts with black promoters?

2. Have Plaintiffs failed to appeal from the order dismissing the antitrust claims against Jam with prejudice, and have Plaintiffs waived and abandoned on appeal every other issue and argument raised before the District Court against Jam by failing to specifically raise them in the opening Brief for Plaintiffs-Appellants ("Plaintiffs Brier")?

STATEMENT OF THE CASE

Nature Of The Case

Plaintiffs commenced this action on November 19, 1998, when they filed-their Complaint against eight "booking agency defendants" (companies that represent performers in booking music concerts) and twenty-six "concert promoter defendants" (companies that produce live music concerts). *Rowe Entm't, Inc. v. The William*

Morris Agency, Inc., No. 98 Civ. 8272, 1999 WL 335139, at *1 (S.D.N.Y. May 26, 1999). Jam was named as one of the concert promoter defendants. Plaintiffs allege that they were excluded from participating as concert promoters in the concert promotion industry because they are black. *Id.* at *2. In their original Complaint, Plaintiffs alleged violations of Section 1 the Sherman Antitrust Act (15 U.S.C. § 1), and violations of Sections 1981, 1985(3) and 1986 of the Civil Rights Acts (42 U.S.C. §§ 1981, 1985(3) and 1986). *Id.* at *4, *7. Plaintiffs have asserted these claims individually, and not as part of a putative class action lawsuit.

Course Of Proceedings

Jam was among the defendants that successfully moved to dismiss all of the claims asserted in Plaintiffs' original Complaint. *Id.* at *1, *9. On August 9, 1999, Plaintiffs filed a six count Amended Complaint alleging the same antitrust and civil rights claims. (Joint Appendix, Volume I, pp. A-103 to A-149). On June 30, 2000, the trial court entered an Opinion and Order granting, in part, Jam's motion to dismiss the Amended Complaint. The District Court dismissed with prejudice the First and Second Claims of the Amended Complaint as they pertained to Jam, thus dismissing all of the antitrust claims against Jam with prejudice. *Rowe Entm't, Inc. v. The William Morris Agency, Inc.*, No. 98 Civ. 8272, 2000 WL 896929, at *15 (S.D.N.Y. July 6, 2000).[1] The Dis-

[1] The District Court specifically stated that "if, during discovery, plaintiffs find evidence in support of any of the dismissed claims, leave to amend the Amended Complaint may be granted pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, provided that plaintiffs make a showing that there is sufficient evidence to proceed with the claim." *Id.* at *15. Plaintiffs never sought leave to amend their Amended Complaint.

trict Court, however, did not dismiss the civil rights claims against Jam. Plaintiffs have not appealed from the District Court's June 30, 2000 Opinion and Order dismissing the antitrust claims against Jam with prejudice. (Plaintiffs Brief, p. 1; Special Appendix, pp. SPA-1 to SPA-184; Joint Appendix, Vol. XXIX, pp. A-19927 to A-19928).

Plaintiffs were allowed extensive oral discovery and exhaustive document discovery, including the review of the computer files and emails retrieved from Defendants' computer hard drives, in order to locate some evidence to support their allegations of racism against Jam. (Special Appendix, p. SPA-76). On January 29, 2003, Jam filed its motion for summary judgment on the remaining civil rights act claims that were pending against it, along with its supporting memorandum of law and its statement of undisputed facts pursuant to the District Court's Local Civil Rule 56.1 ("Local Rule 56.1"). (Joint Appendix, Volume I, pp. A-325, A-327, A-611).

Plaintiffs moved for and were granted an extension of time to respond to Jam's summary judgment motion. (Joint Appendix, Volume I, p. A-75).

Plaintiffs filed their initial response brief and Local Rule 56.1 statement in opposition to Jam's summary judgment motion on or about February 28, 2003. (Joint Appendix, Volume I, p. A-76). Plaintiffs then requested and were granted leave to file a revised response brief and revised Local Rule 56.1 statement in opposition to Jam's summary judgment motion on or before March 13, 2003. (Joint Appendix, Volume IV, pp. A-2513.48 to A-2513.49). Jam filed its reply memorandum and supporting affidavit on or about March 14, 2003. (Joint Appendix, Volume IV, pp. A-2513.1, A-2513.64).

On May 30, and June 2, 2003, the District Court entered orders finding that Plaintiffs had failed to prop-

erly respond to Defendants' Local Rule 56.1 statements, provided Plaintiffs with an instructing memorandum regarding a proper response, and granted Plaintiffs leave to file proper counter-statements. (Special Appendix, pp. SPA-1 to SPA-2 n.1; Joint Appendix, Volume XXV, pp. A-17602 to A-17607).

Disposition In The District Court

On January 4, 2005, the District Court issued its Opinion and Order. (Special Appendix, p. SPA-1); *Rowe Entm't, Inc. v. The William Morris Agency, Inc.*, No. 98 Civ. 8272, 2005 WL 22833 (S.D.N.Y. Jan. 5, 2005). The District Court struck those portions of Plaintiffs' Local Rule 56.1 statements that still did not comply with the rules. (Special Appendix, pp. SPA-1 to SPA-2 n. 1); *Rowe Entm't, Inc.*, 2005 WL 22833, at *1

The District Court further granted Jam's motion for summary judgment in its entirety, finding:

> As discussed below, the specific incidents which Plaintiffs claim demonstrate racial discrimination by Jam and Beaver [the other remaining concert promoter Defendant] in violation of 42 U.S.C. § 1981 are not supported by evidence raising a genuine issue of material fact sufficient to survive the Defendants' summary judgment motions. Jam and Beaver were purchasers of artist talent. Plaintiffs have not shown that Sam or Beaver took any action in violation of § 1981 that affected Plaintiffs' ability to purchase artist talent. Nor have Plaintiffs provided any evidence to support their claim that Jam or Beaver were members of a conspiracy with the Booking Agency Defendants to exclude Plaintiffs from the contemporary music

> concert promotion market in violation of § 1985(3). Therefore, Plaintiffs have no basis for their § 1986 claim against Jam and Beaver.

(Special Appendix, p. SPA-64); *Rowe Entm't, Inc.*, 2005 WL 22833, at *30.

The District Court thus concluded that, "after weighing all the evidence in this case **and drawing all inferences in favor of the Plaintiffs,** that Plaintiffs have raised no genuine issue of material fact and that no rational trier of fact could find for Plaintiffs on any of the myriad of claims made in this action." (Special Appendix, p. SPA-173); *Rowe Entm't, Inc.*, 2005 WL 22833, at *87 (emphasis added). This appeal followed.

STATEMENT OF FACTS

The Concert Promotion Business

In the concert promotion business, the concert promoters are the "buyers" of the talent or artist, and the booking agents are the "sellers" of the talent or artists. (Special Append IX, p. SPA-10). The concert promotion business is founded on relationships that are developed over time including relationships among and between artists, managers, agents, promoters, vendors and radio stations. (Special Appendix, p. SPA-10 & n.14; Joint Appendix, Volume XXV, p. A-17608.3, ¶ 1).

Artists, Managers And Agents

The concert promotion business starts with the musical artists that perform live in concert. An artist typically has a manger to oversee all aspects of the artist's career. (Special Appendix, p. SPA-11; Joint Appendix, Volume

XXV, p. A-17608.4, ¶ 2). The artist's manager may also engage a booking agency to route and book concert tours for the artist. (Special Appendix, p. SPA-1 1; Joint . Appendix, Volume XXV, p. A-17608.4, ¶ 3). The artist or the artist's manager may designate the number of concerts, the period during which they would be performed, and the artist's preference for locale, for venue and for promoter, among other aspects. (Special Appendix, p. SPA-11; Joint Appendix, Volume VII, pp. A-4870 to A-4875). The agent at the booking agency, among other things, obtains offers from concert promoters to present to the artist or artist's manager. (Special Appendix, p. SPA-11; Joint Appendix, Volume VII, p. A-4876).

Concert Promoters

The concert promoter is the entity that acquires the act and contracts with the artist. (Special Appendix, p. SPA-11 & n.15; Joint Appendix, Volume XXV, p. A-17608.4, ¶ 5). The concert promoter is responsible for all of the financial obligations of the show, including among other things, the artist's guarantee, the deposit for the concert venue, production costs, advertising costs, insurance costs and all other show expenses, regardless of ticket sales. (Special Appendix, pp. SPA-11 to SPA-12 & n.16; Joint Appendix, Volume XXV, p. A-17608.5, ¶¶ 6-7). Consequently, because the concert promoter is bearing the financial risk, he can lose money even on a concert that is expected to be profitable. (Special Appendix, p. SPA-12; Joint Appendix, Volume XXV, p. A-17608.6, ¶ 8).

Co-Promoters

A "lead" concert promoter may, on occasion, retain the services of a co-promoter to assist the lead promoter

with certain promotion tasks within a particular market. (Special Appendix, p. SPA-12 & n.17; Joint Appendix, Volume XXV, p. A-17608.6, ¶ 9). Since a co-promoter has a financial interest in the profits or losses of the show, retaining a co-promoter necessarily reduces the lead promoter's potential profit. (Special Appendix, p. SPA-12; Joint Appendix, Volume VI, p. A-3921). By contrast, a concert promoter may hire a "street promoter" or "consultant" to assist with certain concert promotion tasks, but who does not share in a show's profits. (Special Appendix, p. SPA-12).

In some instances, the artist, the artist's manager or the booking agency may require that the lead concert promoter retain a co-promoter. (Special Appendix, p. SPA-12; Plaintiffs Brief, p. 74 n.27). In other instances, the lead promoter may decide to hire a co-promoter because of the co-promoter's particular knowledge, for example, of the market in which the concert is to be performed or the type of music that is to be performed at the concert, or because the co-promoter may have other expertise that the lead promoter lacks. *(See* Special Appendix, pp. SPA-12 to SPA-13 & nn.19-20, SPA-18 to SPA-20 & n37; Joint Appendix, Volume XXV, pp. A-17608.6, ¶ 9, A-17608.22 to A-17608.30, ¶¶ 41-51).

According to Plaintiff Rowe, the factors that are considered in determining whether or not to hire a co-promoter are "[c]ertain factors such as the territory you're playing in, your relationship with that promoter, needing his ability, his influence in that particular market. Like I said before, the relationship. Sometime it's just a relationship thing." (Joint Appendix, Volume XXVIII, p. A-18907). Similarly, one of Jam's owners explained Jam's use of co-promoters when he testified: "[w]e'll copromote with anybody, regardless of what race they are if they bring us something that we don't already have. So

if it is in a market that we are not in or that we don't regularly like to go in and they have an expertise and a knowledge that we don't have, we would be glad to work with them" (Special Appendix, p. SPA-80; Joint Appendix, Vol. III, p. A-1958).

Jam And Plaintiffs

Jam is a concert promotion company with its principal place of business located in Chicago. (Appellants' Brief, p. 11; Special Appendix, p. SPA-6). Plaintiffs contend that they are also concert promoters, but acknowledge that they maintain their principal places of business in locations other than Chicago. (Special Appendix, p. SPA-5).

Jam is owned and operated by Mr. Array &mat and Mr. Jerry Mickelson, who are white. (Appellants' Brief, p. 11; Special Appendix, p. SPA-6). The corporate Plaintiffs are owned and operated by the individual Plaintiffs, who are black. (Appellants' Brief, pp. 7-9; Special Appendix, p. SPA-5).

Jam is a successful concert promotion business. (Appellants' Brief, p. 11; Special Appendix, pp. SPA-6). Jam promotes more concerts than do the Plaintiffs. (*Compare* Special Appendix, pp. SPA-47 to SPA-57 (summarizing the evidence relating to the promotion records of Plaintiffs), *with* Special Appendix, p. SPA-59 (summarizing the evidence relating to the promotion records of the "Promoter Defendants")). However, there are also black owned concert promotion companies that are more successful than the Plaintiffs. (Special Appendix, pp. SPA-57 to SPA-58 (summarizing the evidence relating to the promotion records of other successful black concert promoters)).

SUMMARY OF ARGUMENT

The District Court's Opinion and Order granting summary judgment should be affirmed because the undisputed facts establish that Jam does not "maintain policies of refusing to promote white acts with a black promoter." (Plaintiffs Brief, pp. 73-74). The only "argument" raised by Plaintiffs with respect to Jam on this appeal is that Jam does not engage black promoters to co-promote concerts performed by white artists, and this alleged fact "supports an inference of impermissible race-based triage on the part of the defendant." (Plaintiffs Brief, p. 74). This argument was not supported by the evidence before the District Court, and was properly rejected. (Special Appendix, pp. SPA-79 to SPA-81).

Further, Plaintiffs' argument is flawed because Jam is not required to co-promote concerts with other promoters, and thus split its potential profits with another concert promotion company. (Plaintiffs Brief, p. 74 n.27). Jam only engages co-promoters "if they bring us something we don't already have," like expertise in a particular market or familiarity with a particular genre of music. (Special Appendix, p. SPA-80 & n.118).

Moreover, Plaintiffs have not identified any specific concert promotions where Jam was looking to hire a co-promoter. Even if Plaintiffs could identify a specific co-promotion opportunity, they have provided no evidence that they were qualified for any such co-promotion (*i.e.*, that Plaintiffs brought something to Jam that it did not already have with its existing workforce), or that they applied for the position, but were denied the co-promotion opportunity on the basis of their race.

The remainder of claims asserted and the arguments advanced by the Plaintiffs in the District Court have been abandoned and waived by Plaintiffs. Plaintiffs have

not appealed from the final order that dismissed the antitrust claims against Jam with prejudice. Plaintiffs have also not included in their opening brief any arguments other than that Jam allegedly "maintain[s] policies of refusing to promote white acts with a black promoter." (Plaintiffs Brief, pp. 73-74). Consequently, to the extent that Plaintiffs may have had any other claims or arguments against Jam, including their antitrust claims, Plaintiffs have abandoned and waived those arguments and claims.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED JAM SUMMARY JUDGMENT

A. The Standard Of Review

Summary Judgment

This Court reviews a grant of summary judgment *de novo. Lutwin v. Thompson,* 361 F.3d 146, 153 (2d Cir. 2004). This means that, viewing the pleadings and evidence in the light most favorable to the non-moving party, summary judgment will be affirmed for the moving party when no genuine issues of material fact exist, and when the moving party is entitled to judgment as a matter of law. FED. R CIV. P. 56(e); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). In order to overcome summary judgment, the non-moving party is required to set forth specific facts showing that a genuine issue exists for trial. FED. R CIV. P. 56(e). "Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for

summary judgment." *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 452 (2d Cir. 1999). The claimed issue of fact must also be genuine, meaning that the party opposing the motion "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The offering of "purely conclusory allegations of discrimination" is insufficient in a summary judgment proceeding. *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985). Thus, the Supreme Court has said that summary judgment may be granted where no reasonable jury could return a verdict for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Enforcement Of Local Civil Rules

However, the District Court's interpretation and application of its own Local Rules is accorded "considerable deference." *LoSacco v. City of Middletown*, 71 F.3d 88, 92 (2d Cir. 1995). Therefore, a District Court has "broad discretion to determine whether to overlook a party's failure to comply with local court rules." *Holtz v. Rockefeller & Co., Inc.*, 258 F.3d 62, 73 (2d Cir. 2001); *see also Millus v. D'Angelo*, 224 F.3d 137, 138 (2d Cir. 2000) (affirming grant of summary judgment were nonmoving party failed to deny, in accordance with Local Civil Rule 56.1, the moving party's statement of undisputed facts).

With respect to summary judgment proceedings, the District Court has adopted Local Rule 56.1, which requires the party moving for summary judgment to submit a short and concise statement of the material facts which he contends are undisputed, and requires the party opposing summary judgment to submit a short and con-

cise statement of the material facts which he contends are disputed. Local Rule 56.1(a)-(b). Local Rule 56.1 further provides that, unless controverted by the required statement of the opposing party, the material fact set forth in the moving parry's statement will be deemed admitted, and each statement must be followed by a citation to admissible evidence. Local Rule 56.1(c)-(d).

Through its May 30, and June 2, 2003 Orders, the District Court advised Plaintiffs that their responses to the Defendants' Local Rule 56.1 statements were not in compliance with the Rules. (Joint Appendix, Volume XXV, pp. A-17602 to A-17607). The District Court further provided Plaintiffs with an instructing memorandum (that was attached to the Orders) on how to properly respond to the Local Rule 56.1 statements, and granted Plaintiffs' leave to file amended statements[2] (Special Appendix, pp. SPA-1 to SPA-2 & n.1; Joint Appendix, Volume XXV, pp. A-17602 to A-17607). In ruling on Defendants' summary judgment motions, the District Court found that many of Plaintiffs' amended responses were still not in compliance with Local Rule 56.1. The District Court struck many of Plaintiffs' responses and found that the moving parties' statements of undisputed facts would be considered undisputed pursuant to Local Rule 56.1(c). (Special Appendix, pp. SPA-1 to SPA-2 & n.1).

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[2] The March 25, 2004 amendment to Local Rule 56.1 specifies the use of numbered paragraphs in the movant's Local Rule 56.1 statement, and a paragraph by paragraph response from the opposing party. However, Judge Patterson's Notes to Counsel Regarding Motions for Summary Judgment (the "instructing memorandum" that was attached to the May 30, and June 2, 2003 Orders) required such a paragraph by paragraph response in 2003, when the motions for summary judgment in this case were being briefed.

Where a party has not complied with Local Rule 56.1, it is within the District Court's discretion to strike and disregard Plaintiffs' non-compliant responses, or "conduct an assiduous review of the record" despite the non-compliance with the local rules. *Holtz,* 258 F.3d at 73. Therefore, the District Court's decision to strike and disregard Plaintiffs' non-compliant responses, and to deem the properly supported facts in Defendants' Local Rule 56.1 statements as admitted, should be reviewed under the abuse of discretion standard. *See Monahan v. New York City Dep't of Corrections,* 214 F.3d 275, 292 (2d Cir. 2000); *citing Downes v. Beach,* 587 F.2d 469, 472 (10th Cir. 1978); *Waldridge v. Am. Hoechst Corp.,* 24 F.3d 918, 923 n. 4 (7th Cir. 1994) (affording district court "considerable deference" in applying its local rules); *Hernandez v. George, 793* F.2d 264, 269 (10th Cir. 1986) (same).

B. The District Court Correctly Ruled That Jam Had Not Violated Plaintiffs' Civil Rights In Connection With Co-Promotions Of Live Concerts

In response to Jam's motion for summary judgment, Plaintiffs argued that "an inference of an intent to discriminate can be drawn against Jam because the evidence shows that Jam has never co-promoted a white act with a black promoter prior to the filing of this lawsuit." (Special Appendix, p. SPA-79). The District Court was correct in rejecting Plaintiffs' argument because it was not supported by the evidence. But even if the lack of evidence were overlooked, Plaintiffs' argument must still fail because Plaintiffs never established specific co-promotion opportunities that existed with Jam, or that they were "qualified" for and "applied" for any such

specific co-promotion opportunity. Accordingly, the District Court's judgment must be affirmed.

1. Plaintiffs' "No Co Promotion With Black Promoters" Argument Is Not Supported By The Evidence

The only argument presented on this appeal that is directed to Jam is found in the two paragraphs appearing on pages 73 and 74 of Plaintiffs Brief.[3] Plaintiffs state "all Plaintiffs assert claims against both Beaver and Jam based on evidence that they maintain policies of refusing to promote white acts with a black promoter." (Appellants' Brief, p. 73). The "evidence" Plaintiffs relied upon to conjure up Jam's supposed policy of refusing to promote white acts with a black promoter, however, simply does not exist. Rather, Plaintiffs again resort to their own "trickery tactics" of misstating the actual record evidence, and asking that it be viewed outside the real world context of when and why a promoter elects to engage a co-promoter. The District Court properly rejected Plaintiffs' argument as being without sufficient evidentiary support, and that ruling should be affirmed.

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[3] Plaintiffs' 'Argument I' is specifically directed to the "Plaintiffs' Claims Against The Booking Agency Defendants Under 42 U.S.C. § 1981." (Plaintiffs Brief, p. 35). Plaintiffs' "Argument H" is directed to the "Promoter Defendants" Jam and Beaver Productions, Inc. ("Beaver"), but the majority of that argument only addresses Plaintiff Fred Jones' specific claims against Beaver. (Plaintiffs Brief, pp. 67-73). Because Plaintiffs have not appealed from the District Court's June 30, 2000 Opinion and Order dismissing the antitrust claims against Jam with prejudice (Plaintiffs Brief, p. 1; Joint Appendix, Vol. XXIX, pp. A-19927 to A-19928), Plaintiffs Argument III' does not pertain to Jam. (Plaintiffs Brief, pp. 75-84).

To support their argument that Jam "maintain[s] policies of refusing to promote white acts with a black promoter," Plaintiffs' claim that Jam's owners "could not recall a single instance of co-promoting a white act with a black promoter." (Plaintiffs Brief, pp. 73-74). However, the District Court correctly looked to the actual deposition testimony from Jam's owners to determine that Plaintiffs' claim was not quite accurate. (Special Appendix, pp. SPA-79 to SPA-81). In reality, Jam's owners testified that they recalled and believed that they had promoted some white artists with some black promoters, but that they could not recall the details. (*Id.*) Indeed, Mr. Granat testified that Jam had co-promoted with a number of black promoters, whom he identified, and testified that he believed that Jam had co-promoted white artists with promoters Al Haymon and Billy Sparks, both of whom are black. (Special Appendix, pp. SPA-79 to SPA-80; Joint Appendix, Vol. III, pp. A-1871 to A-1874, A-1882 to A-1886). Mr. Mickelson corroborated Mr. Granat's testimony, and testified that Jam had co-promoted white artists with black promoter Jerry Dickerson, who "was located in a different city, and [ ] had a knowledge of a market we didn't know." (Special Appendix, pp. SPA-80; Joint Appendix, Vol. III, p. A-1959). Moreover, black promoter Al Kennedy submitted an affidavit that was prepared long before Jam's summary judgment motion, in which he identified numerous artists that he had co-promoted with Jam, including artists that are white or appeal to white audiences. (Special Appendix, pp. SPA-80 to SPA-81; Joint Appendix, Vol. III, p. A-1959).

It was Plaintiffs, not Jam, that failed to present any evidence to support their flawed conjecture that Jam maintains a policy against co-promoting white artists

with black promoters. Indeed, Mr. Mickelson's unequivocal testimony stands unrefuted:

> We'll copromote with anybody, regardless of what race they are if they bring us something that we don't already have. So if it is in a market that we are not in or that we don't regularly like to go in and they have an expertise and a knowledge that we don't have, we would be glad to work with them.

(Special Appendix, p. SPA-80; Joint Appendix, Vol. III, p. A-1958).

Apart from the perhaps imprecise recollection of Jam's owners regarding the . details of the concerts and other events that they have promoted over the past three decades, Plaintiffs have offered no evidence to support their incendiary claim that Jam is a participant in an "impermissible race-based triage . . . ." (Plaintiffs Brief, p. 74). Instead, Jam presented a motion for summary judgment that was properly supported by an evidentiary record, which Plaintiffs attempted to oppose solely with conclusions and speculation, rather than evidence. Clearly, "[s]tatements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment," *(Bickerstaff,* 196 F.3d at 452), and the mere raising of a "metaphysical doubt" *(Matsushita Elec. Indus. Co.*, 475 U.S. at 586), or the offering of "purely conclusory allegations of discrimination" are insufficient in a summary judgment proceeding. *Meiri*, 759 F.2d at 998. In fact, despite full access to Jam's files, including computer files and emails (Special Appendix, p. SPA-76), Plaintiffs apparently never performed any statistical or other analysis of Jam's co-promotions to determine if there was any evidentiary support for their argument. *See*

Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-51 (1989); *Robinson v. Metro-North Commuter R.R. Co.,* 267 F.3d 147, 160 (2d Cir. 2001). Plaintiffs' argument was not supported by evidence when it was presented to the District Court and, therefore, was properly rejected. (Special Appendix, pp. SPA-79 to SPA-81).

To be sure, Plaintiffs surmise that since Jam may co-promote more black artists with black promoters than it co-promotes white artists with black promoters, the inference that must be drawn is that there is racial discrimination. Plaintiffs' argument, however, is a classic red herring because, even if this fact suggested an inference of race discrimination (which, as explained below, it does not), this is not a class action lawsuit. *See Gilty v. Village of Oak Park,* 919 F.2d 1247, 1252-53 & n.8 (7th Cir. 1990) ("Standing virtually alone, as they are in this case, statistics cannot establish a case of individual disparate treatment"); *Williams v. Boorstin,* 663 F.2d 109, 115 n.38 (D.C. Cir. 1980) (In a non-class action lawsuit, "evidence of systematic or general instances of discrimination can only be collateral to evidence of specific discrimination against the actual plaintiff"). In their rush to unfairly charge Jam with racial discrimination, Plaintiffs' suspicion that Jam more often co-promotes black artists with black promoters than white artists with black promoters simply ignores the realities of the very concert promotion business in which Plaintiffs claim to be qualified to participate.

All of the parties to this case - the booking agency Defendants, the promoter Defendants, and even Plaintiffs themselves - agree that there are different genres of music that tend to appeal to different audiences. (Special Appendix, p. SPA-13; Joint Appendix. p. A-17608.8, ¶¶ 14-15). Plaintiffs' Amended Complaint, in fact, refers to certain genres of music as "black music" and others as

"white music" (Special Appendix, p. SPA-13; Joint Appendix. p. A-17608.8, ¶ 14-15), and it is . undisputed that concert promoters may specialize in a particular field of music. (Special Appendix, p. SPA-13 & n.19; Joint Appendix. pp. A-17608.8 to A17608.9, 16-17). Because engaging a co-promoter necessarily results in the lead promoter splitting its potential profit from a concert with its co-promoter (Special Appendix, p. SPA-12; Joint Appendix, Volume VI, p. A-3921), clearly a concert promoter would not have a reason to engage a co-promoter unless the co-promoter had some expertise that the lead promoter needed order to stage a successful concert promotion. *(See* Joint Appendix, Volume XXVIII, p. A-1890, Plaintiff Mr. Rowe testified: "[c]ertain factors such as the territory you're playing in, your relationship with that promoter, needing his ability, his influence that particular market."; Special Appendix, p. SPA-80; Joint Appendix, Vol. III, p. A-1958, Mr. Mickelson from Jam testified: "[w]e'll copromote with anybody, regardless of what race they are if they bring something that we don't already have. So if it is in a market that we are not in or that we don't regularly like to go in and they have an expertise and a knowledge that we don't have, we would be glad to work with them").

The mere fact that Jam may engage a co-promoter more frequently when it is promoting a black artist or an artist that appeals to a predominantly black audience, rather than when it is promoting a white artist or an artist that appeals to a predominantly white audience, simply means that Jam is tapping into the co-promoters' particular area of expertise. As common sense would dictate, Jam would be expected to engage a co-promoter more often when it is promoting a black artist or an artist that appeals to a predominantly black audience. Consequently, Plaintiffs' assertion that "Jam co-promotes all

of its black acts with black promoters" simply does not support Plaintiffs' racially charged inference that Jam engages in some type of "impermissible race-based triage . . . ." (Plaintiffs Brief, p. 74). If anything, the fact that Jam regularly engages black promoters to assist it in promoting black artists or the genre of music that Plaintiffs identify as "black music" (Special Appendix, p. SPA-13; Joint Appendix. p. A-17608.8, ¶ 14-15), certainly suggests that Jam is not involved in any type of race discrimination. *See Schachner v. Beth Israel Med. Ctr.*, 14 F. Supp. 2d 468, 471 (S.D.N.Y 1998) (an inference of religious discrimination could not be drawn where employer offered position to someone else with similar religious practices).

Plaintiffs did not have evidence to support their "no co-promotion with black promoters" argument before the District Court, and they have not offered any argument on this appeal to warrant the reversal of the District Court's rejection of their argument. Simply put, Plaintiffs have no evidence to support their inflammatory contention that Jam "maintain[s] policies of refusing to promote white acts with a black promoter," and thus is a participant in an "impermissible race-based triage . . . ." (Plaintiffs Brief, pp. 73-74). The District Court's Opinion and Order granting Jam's summary judgment motion should be affirmed.

2. *Plaintiffs Have Not Identified Any Co Promotion Opportunities For Which They Were Qualified And Applied But Were Denied Because Of Their Race*

Plaintiffs contend in their two paragraph argument that "[a]n African American promoter—including all of the Plaintiffs—cannot hope to compete on an even playing field for the numerous co-promotion opportunities that arise each year for white artists in Jam promotions." (Plaintiffs Brief, p. 74). The fundamental flaw with Plaintiffs' contention, however, is that they have not specifically identified any such co-promotion opportunities. Consequently, Plaintiffs have not identified any such co-promotion opportunities for which they were qualified, for which they applied, and for which Jam denied them the opportunity to co-promote on the basis of their race. Without any analysis of when, where and how often Jam employs a co-promoter for a promotion involving a white artist or an artist that appeals to a white audience, Plaintiffs' argument is patently frivolous. FED. R. APP. P. 38.

As the Supreme Court made clear in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in a private, non-class action, the complainant bears the initial burden of establishing a prima facie case of racial discrimination "by showing (i) that he belongs to a racial minority; (ii) that he applied for and was qualified for a. job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.* at 802; *accord, Gilty*, 919 F.2d at 1252-53 & n.8; *Williams*, 663 F.2d at 115 n.38. In other words, not only are Plaintiffs required to

show the circumstance of when and where Jam was hiring a co-promoter, they must show that they applied for the position of Jam's co-promoter but were rejected. *See Brown v. Coach Stores, Inc.*, 163 F.3d 706, 710 (2d Cir. 1998) ("[w]e read *McDonnell Douglas* and *Burdine* generally to require a plaintiff to allege that she or he applied for a specific position or positions and was rejected therefrom, rather than merely asserting that on several occasions she or he generally requested promotion"). In addition, claims of disparate impact, like those apparently asserted by Plaintiffs against Jam (Plaintiffs Brief, pp. 73-74), cannot support Plaintiffs' Section 1981 claims. *Franklin v. City of Evanston*, 384 F.3d 838, 848 (7th Cir. 2004); *Boykin v. Key Corp.*, No. 03 CV. 944S, 2005 WL 711891, at *5 (W.D.N.Y. Mar. 28, 2005); *Tamayo v. City of New York*, No. 02 Civ. 8030, 2004 WL 137198, at *4 (S.D.N.Y. Jan. 27, 2004).

It is Plaintiffs' contention that "numerous co-promotional opportunities [ ] arise each year for white artists in Jam promotions." (Plaintiffs Brief, p. 74). However, Plaintiffs cite to absolutely nothing in the record to support this conclusion. *See Sioson v. Knights of Columbus*, 303 F.3d 458, 460 (2d Cir. 2002) ("[t]o make a legal argument is to advance one's contentions by connecting law to facts, yet there is not one fact, or supposed fact, let one a fact properly cited to the record, in the brief's `argument' section"). To be sure, Plaintiffs contend that they "adduced evidence that Jam promoted up to 1,200 events nationwide in 2001 and 2002." (Plaintiffs Brief, p. 73).[4] However, Plaintiffs have offered no analysis, sta-

[4] This is another example of Plaintiffs' misleading arguments because, while they are complaining about allegedly being excluded from the promotion of music concerts, the reference to Jam's estimate of "1200 events" includes "theater and shows other than music concerts." (Joint Appendix, Vol. N, pp. A-2513.7 to A-2513.8, ¶ 18).

tistical or otherwise, of how often Jam sought or engaged co-promoters for those supposed 1200 events. Simply put, other than the "naked numbers, standing unadorned and unexplained" Plaintiffs "proffered no expert testimony or other insights to show the probativeness of the figures, their likely statistical significance, or the inferences which might properly be drawn from them." *Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 184 (1st Cir. 1989); *see also Bickerstaff*, 196 F.3d at 448-49 (statistical evidence failed to raise inference of discrimination because it did not take into account number of applicants); *Howard v. B.P. Oil Co.*, 32 F.3d 520, 524 (11th Cu. 1994) (for statistical evidence to be relevant, it must include number of black applicants who were rejected); *Brown v. Am. Honda Motor Co.*, 939 F.2d 946, 952 (11th Cir. 1991) (statistic that only two of 860 dealerships are minority-owned is meaningless because it failed to show how many minorities applied for and were denied dealerships).

In addition to not providing any evidentiary support for their conclusion that there are "numerous co-promotional opportunities" each year for white artists that Jam promotes (Plaintiffs Brief, p. 74), Plaintiffs have not identified any specific co-promotional opportunity that was being offered by Jam, and for which any of the Plaintiffs were qualified and applied. *McDonnell Douglas Corp.*, 411 U.S. at 802. Clearly, Jam is not required to engage a co-promoter for every concert that it promotes (Plaintiffs Brief, p. 74 n.27), and thus reduce its potential profit by splitting it with another promoter. (Special Appendix, p. SPA-12; Joint Appendix, Volume VI, p. A-3921). For this reason alone, common sense dictates that a successful concert promoter would not engage a co-promoter unless the co-promoter "brought something to the table" that the lead promoter was lack-

ing. (*See* Special Appendix, p. SPA-80; Joint Appendix, Vol. III, p. A-1958).

Plaintiffs, however, presented no evidence in the District Court to demonstrate that there were any specific opportunities to co-promote white artists with Jam, where Plaintiffs were qualified to be Jam's co-promoter because they brought something to Jam that Jam did not already possess within its existing workforce. Plaintiffs cannot seriously contend, for example, that Jam should hire Plaintiff Rowe from Atlanta, Georgia or Plaintiff King from Jackson, Mississippi, for example, to co-promote one of Jam's shows in Chicago, the city where Jam is based. (*See* Special Appendix, p. SPA- 5). Likewise, Plaintiffs have not identified or analyzed any concerts promoted by Jam in any of Plaintiffs' hometowns, or any concerts promoted by Jam allegedly outside of its area of expertise, where Jam might consider engaging a co-promoter. Clearly, if Jam has the expertise within its own work force to successfully promote a concert, there simply is no reason for Jam to hire a co-promoter. (Plaintiffs Brief, p. 74 n.27). Similarly, there is simply no evidence to suggest that Plaintiffs ever sought a co-promotion opportunity from Jam when Jam was offering a co-promotion opportunity.

Certainly, the civil rights acts do not require Jam to co-promote concerts with other promoters, let alone the Plaintiffs, as such a requirement would reduce Jam's potential profit. This is especially true where there is absolutely no evidence to suggest that Plaintiffs had any specialized knowledge, experience or expertise that Jam did not already possess within its already existing and established workforce, and there is no evidence that Jam was ever seeking a co-promoter and Plaintiffs sought the position, but were denied the opportunity because of their race. The District Court correctly rejected Plain-

tiffs' frivolous argument, and that decision should be affirmed.

C. Plaintiffs Have Waived All Additional Arguments, Including The Dismissal Of The Antitrust Claims Against Jam

In granting Jam's summary judgment motion on Plaintiffs' civil rights act, claims, the District Court noted that the Plaintiffs' antitrust claims against Jam had previously been dismissed with prejudice, and Plaintiffs had never sought to replead them (Special Appendix, p. SPA-27 n.42). Plaintiffs have now appealed from the District Court's January 4, 2005 Opinion and Order granting Defendants' respective motions for summary judgment and the subsequently entered judgment orders. Plaintiffs have not, however, appealed from the District Court's June 30, 2000 Opinion and Order dismissing the antitrust claims against Jam with prejudice. *Rowe Entm't, Inc.*, 2000 WL 896929, at *15. Further, Plaintiffs have not argued in their opening brief that the District Court's dismissal of those claims was somehow improper. Consequently, the dismissal of Plaintiffs' antitrust claims against Jam, and any additional arguments not specifically asserted in their opening brief, are not before this Court.

1. Plaintiffs Have Not Appealed From The Final Order Dismissing The Antitrust Claims Against Jam With Prejudice

Plaintiffs' original Complaint asserted antitrust claims against all Defendants, including Jam, but those claims were dismissed on May 26, 1999. *Rowe Entm't, Inc.*, 1999 WL 335139, at * 1. Plaintiffs were granted leave to file their Amended Complaint, which they did on August

9, 1999, and again they asserted antitrust claims against all Defendants, including Jam. (Joint Appendix, Volume I of XXIX, pp. A-103 - A-149). Jam again moved to dismiss the antitrust claims against it, and the District Court dismissed those claims with prejudice in its June 30, 2000 Opinion and Order. With respect to the antitrust claims against Jam, the District Court's June 30, 2000 Opinion and Order was the final order. *Rowe Enm't, Inc.*, 2000 WL 896929, at *15.

Plaintiffs have not appealed from the final order that dismissed the antitrust claims against Jam with prejudice. The District Court's July 6, 2000 Opinion and Order was not listed in Plaintiffs' Notice of Appeal. (Joint Appendix, Vol. XXIX, pp. A-19927 to A-19928). Nor was that order identified in the Jurisdictional Statement section of Plaintiffs Brief, or the Special Appendix for this Appeal. (Plaintiffs Brief, p. 1; Special Appendix, pp. SPA-1 to SPA-184). Clearly, Plaintiffs have not appealed from the District Court's order that disposed of the antitrust claims against Jam. *See Johnson v. Smithsonian Inst.*, 189 F.3d 180, 181 n.2 (2d Cir. 1999), *citing* FED. R. APP. P. 3(c)(1)); *Capital Par, Inc. v. Southeastern Adver. & Sales Sys., Inc.*, 30 F.3d 627, 630 (5th Cir. 1994).

Rule 3(c)(1)(b) of the Federal Rules of Appellate Procedure specifically requires the Appellant to "designate the judgment, order, or part thereof being appealed. . . ." FED. R. APP. P. 3(c)(1)). Plaintiffs' Notice of Appeal states that Plaintiffs are appealing "from each of the following final judgments entered by this Court, together with all prior orders and opinions incorporated in each of the final judgments: Judgment entered February 7, 2005 in favor of Defendant The William Morris Agency, Inc.; Judgment entered February 7, 2005 in favor of Defendant Renaissance Entertainment, Inc.; Judgment entered

February 7, 2005 in favor of Defendant Creative Artists Agency, LLC; Judgment entered February 10, 2005 in favor of Defendant Jam Productions, Ltd.; and Judgment entered February 14, 2005 in favor of Defendant Beaver Productions, Inc." (Joint Appendix, Vol. XXIX, p. A-19927). Notably, nowhere in their Notice of Appeal have Plaintiffs designated the District Court's June 30, 2000 Opinion and Order as being an order that is being appealed. And, although the Judgment orders identified in Plaintiffs' Notice of Appeal refer to and incorporate the District Court's January 4, 2005 Opinion and Order granting Defendants' summary judgment motions, none of those judgment orders designated by Plaintiffs in their Notice of Appeal referred to or incorporated the prior June 30, 2000 Opinion and Order. (Special Appendix, pp. SPA-175 to SPA-184). Having failed to provide any indication in their Notice of Appeal that they intended to appeal from the District Court's June 30, 2000 Opinion and Order dismissing the antitrust claims against Jam with prejudice, Plaintiffs have not met the "mandatory and jurisdictional" requirements for appealing from that order. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314-17, (1988), *quoting* FED. R. APP. P. 3 advisory committee's note; *Brandt v. Schal Assocs., Inc.*, 854 F.2d 948, 954-55 (7th Cir. 1988).

While it is plainly evident that Plaintiffs have not appealed from the District Court's June 30, 2000 Opinion and Order dismissing the antitrust claims against Jam with prejudice, Plaintiffs' tactic of referring to parties using the generic terms of "Defendants," "Promoter Defendants" and "Booking Agency Defendants" could be interpreted as including Jam in their antitrust argu-

ments. (*See* Plaintiffs Brief, pp. 75-84).[5] Indeed, while Plaintiffs allege in their antitrust argument that "the Amended Complaint alleges that the Promoter Defendants engaged in a conspiracy through which they are 'designated specific territories and venues, allowing them great dominance and control in theses areas, to the exclusion of plaintiffs and others' and that the "Booking Agency Defendants agreed to sign on the favored promoters to 'promot[e] the defendant booking agents' top acts in the promoter defendant's assigned territory . . .' " (Plaintiffs Brief, p. 75), they conveniently ignore the fact the antitrust claims against Jam in that Amended Complaint were dismissed with prejudice. This Court should not allow Plaintiffs to somehow resurrect failed antitrust claims against Jam from which they have not properly appealed simply through their use of generic references to the parties in their argument. To the extent, however, that this Court does consider Plaintiffs' antitrust claims against Jam, Jam adopts the arguments presented by the other Defendants in this case.

2. *Plaintiffs Have Abandoned And Waived Any And All Arguments And Issues Not Specifically Addressed In Their Opening Brief*

Plaintiffs' opening brief with respect to Jam further limits Plaintiffs' arguments on this appeal solely to the

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[5] The only specific reference to Jam in Plaintiffs' antitrust argument relates to some handwritten notes that Plaintiffs misleadingly argue the District Court failed to mention. (Plaintiffs Brief, p. 79). However, not only did the District Court mention this supposed evidence, it correctly rejected the contention that the notes were evidence of a conspiracy to have Jam dominate the Chicago area. (Special Appendix, SPA-82).

"no co-promotion with black promoters" argument addressed previously in this brief. Even a cursory examination of Plaintiffs Brief reveals that the only argument presented on this appeal that is directed to Jam is found in the two paragraphs appearing on pages 73 and 74 of that Brief. For example, Plaintiffs' "Argument I" is specifically directed to the "Plaintiffs' Claims Against The Booking Agency Defendants Under 42 U.S.C. § 1981." (Plaintiffs Brief, pp. 35-67). Plaintiffs' "Argument II," which although is captioned as being directed at both "Promoter Defendants" Jam and Beaver, in reality is primarily devoted to Plaintiff Fred Jones' specific, individual claims against Beaver. (Plaintiffs Brief, pp. 67-73).

While at first blush, Plaintiffs appear to include Jam in their "Argument III" regarding the granting of Defendants' summary judgment motions on the antitrust claims (Plaintiffs Brief, pp. 75-84), that argument cannot apply to Jam because Jam did not move for summary judgment on Plaintiffs' antitrust claims. Jam did not need to move for summary judgment on those antitrust claims, because those claims had previously been dismissed with prejudice years earlier. Indeed, since Plaintiffs never took the District Court up on its invitation to seek leave to amend their Amended Complaint if they believed that they had uncovered evidence during discovery to support their dismissed claims *(Rowe Entm't, Inc.*, 2000 WL 896929, at *15), it is evident that after years of discovery Plaintiffs conceded that there simply was no evidence to support bringing antitrust claims against Jam

Without question, an argument or an issue that is not raised on appeal may fairly be considered abandoned. *See Wills v. Amerada Has Corp.*, 379 F.3d 32, 52 (2d Cir. 2004); *LoSacco*, 71 F.3d at 92-93; FED. R. APP. P.

28(a)(9) (requiring that the appellant's brief must contain the appellant's contentions and the reasons for them). Similarly, "[a]rguments may not be made for the first time in a reply brief." *Knipe v. Skinner,* 999 F.2d 708, 711 (2d Cir. 1993); *See also O'Hara v. Weeks Marine, Inc.,* 294 F.3d 55, 67 n.5 (2d Cir. 2002); *Ernst Haas Studio, Inc. v. Palm Press, Inc.,* 164 F.3d 110, 112 (2d Cir. 1999); *Grant v. News Group Boston, Inc.,* 55 F.3d 1, 7 (2d Cir. 1995). Combined, these sound principles mean that Plaintiffs have waived and abandoned nearly all of the arguments that they raised in the District Court in opposition to Jam's motion for summary judgment on Plaintiffs' claims that Jam allegedly violated Sections 1981, 1985(3) and 1986 of the Civil Rights Acts (42 U.S.C. §§ 1981, 1985(3) and 1986). It also means that since nowhere in their opening brief have Plaintiffs argued the District Court committed error in its June 30, 2000 Opinion and Order, when it dismissed the antitrust claims against Jam with prejudice, Plaintiffs would have waived and abandoned any chlenge to that order even if they had properly designated it their Notice of Appeal. FED. R. APP. P. 3(c)(1)(b).

The sole exception to Plaintiffs' waiver and abandonment of the arguments raised below is with respect to the two paragraph argument that Jam allegedly does not co-promote white artists with black promoters. (Plaintiffs Brief, pp. 73-74). However, explained previously, Plaintiffs' supposed "no co-promotion with black promoters" argument is not supported by any evidence. Indeed, Plaintiffs' argument suffers from the fundamental flaw that Jam is not required to hire co-promoters, and thus reduce its profits, a fact that Plaintiffs themselves are forced to acknowledge. (Plaintiffs Brief, p. 74 n.27).

Plaintiffs' "no co-promotion with black promoters" argument is frivolous, as is this entire appeal with respect to Jam since it is the only argument that Plaintiffs could apparently muster. Plaintiffs have dragged out their case against Jam for years without a shred of evidence, and they continue to do it with this appeal. Consequently, this Court should find Plaintiffs' appeal with respect to Jam frivolous under Rule 38, and should award Jam just damages and double its costs. FED. R. APP. P.38.

CONCLUSION

Because Plaintiffs have completely failed to meet their burden of establishing their claim that Jam violated their civil rights by not co-promoting white artists with Plaintiffs, Jam respectfully requests that the District Court's January 4, 2005 Opinion and Order granting Jam summary judgment be affirmed, that Plaintiffs' appeal as to Jam be deemed frivolous, and that Jam be awarded just damages and double costs in accordance with Rule 38 of the Federal Rules of Appellate Procedure.

Dated: New York, New York
July 27, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 8,082 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The word count was measured by the word-processing system used to prepare the brief, Microsoft® Office Word 2003.

Dated: New York, New York
July 27, 2005

/s/ MONICA PETRAGLIA MCCABE
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PRELIMINARY STATEMENT

The focus of Plaintiffs' § 1981 claims against the Booking Agency Defendants is clear: "The primary issue is whether the Booking Agency Defendants fail to provide African American promoters sufficient notice and information to allow them to compete on a level field of play. . ." Plaintiffs-Appellants' Opening Brief ("Rowe Br.") at 64; *see also id.* at 4, 17, 46, 53-54. The complained-of conduct in this case is not primarily Defendants' rejection of bids from Plaintiffs for one or more concert dates. The conduct at issue here—the "adverse contracting action," to use Defendants' term—is the consistent refusal of the Booking Agency Defendants to provide Plaintiffs with equal notice and bidding opportunities. This case does not involve "five incidents," as Defendants allege in their opposition briefs. This case involves hundreds of contracts for which Plaintiffs were qualified, and on which they would have bid if Defendants had not refused to provide them, on racially motivated grounds, with the notice and opportunities to bid that Plaintiffs sought.

Accordingly, Plaintiffs argued in their Opening Brief that the district court erred in isolating individual incidents and "run[ning] them through the *McDonnell Douglas* mill;" instead, the district court should have applied the *McDonnell Douglas* test to determine whether a triable issue of fact exists on the question of "whether racial animus underlies, to any degree, Defendants' provision of inferior opportunities to the Plaintiffs." Rowe Br. at 64-65.

In opposition, the Booking Agency Defendants totally ignore Plaintiffs' arguments and instead focus *exclusively* on individual transactions, such as WMA's award of the Maxwell tour to Magic Johnson Productions, or

CAA's award of the Janet Jackson tour to Magicworks. While Defendants' self-serving distortions of those incidents only highlight the existence of material factual issues, their myopic focus on a handful of incidents misses the principal point of the case: the Booking Agency Defendants regularly and persistently fail to provide Plaintiffs equal notice and bidding opportunities.

Throughout their Opposition Brief ("Opp. Br."), Defendants repeatedly fail to confront Plaintiffs' arguments on appeal. The Booking Agency Defendants fail, for example, to rebut Plaintiffs' showing that they never receive notice of bidding opportunities for the Booking Agency Defendants' clients, no matter how diligently they may try to ferret them out, whereas the dominant white promoters are always solicited or advised of opportunities to submit bids. By the same token, the Booking Agency Defendants fail even to cite, much less distinguish, the case law of this Court and others establishing that the "application requirement" of the *McDonnell Douglas* test is excused, and deemed satisfied, where the defendant fails to make the opportunity known to the would-be applicant. *See, e.g., Mauro v. S. New Eng. Telecomms., Inc.*, 208 F.3d 384, 387 (2d Cir. 2000); Rowe Br. at 44-47 (discussing *Mauro*). Nor do Defendants tackle the common sense proposition that there can be no "application requirement" where the discrimination is accomplished by denying black promoters notice of the jobs for which they would otherwise apply.

Nor do the Booking Agency Defendants rebut Plaintiffs' showing that a primary asserted justification for not dealing with Plaintiffs—the notion that Plaintiffs lacked financial stability relative to other potential bidders, or that Rowe had an arrest record—is pretextual. As shown in the Opening Brief, the Booking Agency Defendants never requested or learned any such financial

or personal information until discovery in this action. That fact stands unrefuted.

In the end, Plaintiffs' core claims—which Defendants pretend not to understand—can be condensed into a handful of simple propositions:

(1) Notwithstanding Plaintiffs' clear expressions of interest in promoting the Booking Agency Defendants' acts, Defendants routinely failed to give Plaintiffs notice of opportunities to submit bids while, at the same time, notifying dominant white promoters. In addition, in certain cases (*e.g.*, Janet Jackson and Kenny G/Toni Braxton), where Plaintiffs managed to obtain information and submit initial bids or inquiries, Defendants *still* failed to afford them the notice and information required to formulate a competitive offer, while providing such information to dominant white promoters.

(2) During the relevant time frame, the Booking Agency Defendants processed hundreds of promotion contracts for which Plaintiffs were amply qualified, and for which it is reasonable to believe they would have submitted bids, given their expressions of interest.

(3) It is reasonable for a jury to conclude that the failure to solicit bids from Plaintiffs, or even to notify them of opportunities, is racially motivated, in light of the following facts, among others:

(a) no more than 1.4% of U.S. concert promoters are black;

(b) Defendants employ purely subjective word-of-mouth hiring or contracting "criteria";

(c) there exist staggering disparities in the financial terms routinely offered by the Booking Agency Defendants to black promoters and white promoters;

(d) there is no evidence that the Booking Agency Defendants have *ever* solicited (or, with one minor exception, even engaged) a black promoter to promote one of their white clients;

(e) the facts underlying the Mud Island, Maxwell, Janet Jackson and other incidents support the inference of discrimination; and

(f) white and black promoters have testified to the pervasive presence of racial discrimination in the concert promotion industry—including at the Booking Agency Defendants.

(4) Defendants' proffered justifications and defenses are pretextual. Among other things: (i) they rely on "after-acquired evidence" in urging the financial wherewithal defense; (ii) they cannot show that any artists or managers are responsible for the failure of the Booking Agency Defendants to notify Plaintiffs of bidding opportunities; and (iii) the presence of one undeniably successful black promoter in the industry is totally irrelevant as a legal matter.

In addition, genuine issues of material fact exist with respect to all Plaintiffs' claims against both Beaver and Jam (the "Promoter Defendants") based upon their general refusal to engage black co-promoters for their white

acts. The Promoter Defendants argue that this claim is in the nature of a "pattern or practice claim," which typically may only be redressed by class action or government agency action—an argument echoed by the Booking Agency Defendants. However, in a *McDonnell Douglas* burden shifting case, a plaintiff may certainly use evidence of a defendant's practices (and, for that matter, of industry statistics) to suggest discriminatory intent. Still, if Defendants were correct, this case would present an issue of first impression: Can a right to redress be limited to class actions where, due to historical discrimination that is perpetuated by Defendants' practices, there are not enough professional black promoters in the United States to fill up a small conference room, much less satisfy the numerosity requirement of Fed. R. Civ. P. 23(a)?

Finally, there exist genuine issues of material fact with respect to Plaintiff Fred Jones's claims under §§ 1985(3) and 1981 against Defendant Beaver and the Booking Agency Defendants, as well as the Plaintiffs' antitrust claims.

STATEMENT OF FACTS[1]

Defendants badly distort the facts surrounding many of the incidents and issues relevant to this appeal, including the facts relating to the tours of Kenny G/Toni Braxton, Janet Jackson, Maxwell and Erykah Badu, as well as Plaintiffs' successful track records as promoters

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[1] Defendants are wrong to argue that plaintiffs do not challenge the district court's refusal to consider certain evidence. Opp. Br. at 4, n.3. Where an erroneous evidentiary ruling is germane to Plaintiffs' argument on appeal, Plaintiffs have endeavored to address that ruling in the opening brief and the instant brief—albeit without styling their arguments as attacks on the grant of motions to strike.

and the Booking Agency Defendants' track records in consistently refusing to engage black promoters to promote their white clients, among other things.

1. Kenny G/Toni Braxton Tour

The record reflects that in October 1996, Rowe called CAA agent Mike Piranian to complain about the exclusion of black promoters from the tour—after having been brushed off by Piranian in earlier calls—and that Piranian told Rowe that he was "sick of you guys" but that, on a strict take or leave it basis, the artist guarantee price was $225,000 to $275,000 (depending on venue) and that Rowe would be required to send in his 50% non-refundable deposit right away if he wanted the contract. (A-5302-03.) Rowe testified that these prices were far too high in his opinion, which was shared by Al Haymon. *Id.*

In their opposition, the Booking Agency Defendants argue that the same terms were quoted to the dominant white promoters, but that the prices were subsequently reduced because the "concerts were not selling well and promoters demanded lower terms." Opp. Br. at 51-52. There are at least three problems with this self-serving reconstruction of history.

First, Defendants' account flies in the face of CAA's assertion, made in a January 6, 1997 letter, that the Kenny G/Toni Braxton tour was "an already very successful tour." (A-1125.) Second, the record contains not one shred of correspondence between CAA and any white promoter quoting the outlandish $225,000-$275,000 figure, suggesting that CAA never used these unrealistic numbers for any purpose other than to deter Rowe from becoming involved.

Third, even if it were true that the price was reduced because the tour was selling poorly, it is undisputed that

this alleged price reduction was never communicated to Rowe. Rowe was given a take it or leave it offer, the finality of which was underscored with the statement "I'm sick of you guys." CAA's defense here appears to be that it continued to negotiate with the dominant white promoters, as the tour price dropped, but that it did not negotiate with Rowe, who had been told in no uncertain terms to shove off. This is a stunningly unpersuasive defense to a claim of refusal to negotiate contracts based on race.

One additional fact regarding the Kenny G tour is worth noting. As shown in the Opening Brief and discussed below at 20-22, the dominant white promoters were always accorded their standard 0-10% deposit terms, and would-be black promoters were required to post a cash deposit in the amount of 50% of the artist guarantee. *See* below at 20-22. The Kenny G tour was no different, but it contains a striking piece of evidence: where Defendant Beaver had a sole contract to promote (*e.g.*, for the dates in Houston and Charlotte), the contracts recited 10% deposit terms on their face. (A-921, A-923.) However, where Beaver was forced to co-promote with Larry Bailey—a black promoter who would have access to the written contract, and who had only ever seen 50% deposit deals from the Booking Agency Defendants in his career, like every other black promoter[2]—the contract calls for a 50% deposit. (A-908.) Finally, to truly close the loop on Defendants' race-

[2] Later in that same tour, Bailey—a long-time personal friend of the artist Kenny G—would receive a contract for one show calling for a 25% deposit (A-16025-26) making Bailey apparently the only black promoter ever to have received a contract from a Booking Agency Defendant calling for a deposit of less than 50%. Still, no black promoters have ever received the 0-10% deals routinely given to the members of the fraternity at issue here. *See* below at 20-22.

based subterfuge, the record contains a canceled check from Beaver to CAA, reflecting that Beaver only paid CAA a 10% deposit after all. (A-907.)

2. Janet Jackson Tour

The Booking Agency Defendants' account of the Janet Jackson incident plays fast and loose with the record evidence, which establishes that CAA withheld information from Rowe to ensure that he would not have a meaningful opportunity to promote the Janet Jackson tour.

(a) Rowe's Dealings With CAA and Rob Light

At the outset, the assertion that CAA gave Rowe "advance notice of the tour and repeatedly encouraged him to bid," Opp. Br. at 56, is nonsense. Incredibly, the Booking Agency Defendants cite to Rowe's deposition for this assertion, (A-4711-12), but Rowe testified that he had to pursue Light for months before extracting even a simple confirmation that Jackson was touring. *Id.* Rowe *certainly* never intimated that Light gave him any advance notice or encouraged him to bid, *id.*; indeed, he has consistently affirmed that he has *never* been solicited by a Booking Agency Defendant. (A-5308.)

In any event, Rowe submitted a firm written offer on February 10, 1998, containing a $300,000 artist guarantee for each of 29 dates. (A-8628-29.) It is undisputed that, in submitting the 29-date offer, Rowe was unaware that CAA (or its client) were interested in seeing bids covering 40 dates. Indeed, CAA now claims that, some time between February 10 and February 20, "Light advised Rowe to submit a more complete and definite offer," Opp. Br. at 56, implying that Light gave Rowe

additional information or bidding parameters. But the record tells a different story. Rowe's February 20, 1998 letter makes clear, on its face, that Light had told Rowe that CAA did not even know whether the Janet Jackson tour would be sold to a national promoter, or on a venue-by-venue basis, and the letter expressly requests additional information to allow Rowe to formulate a bid. (A-8706; *see also* A-5308) (Rowe denies Light gave him any additional information.)

In reality, CAA had been negotiating an exclusive tour promotion contract for 40-plus dates with Magicworks since at least January 1998. (A-15310-13; A-15332-33.) Draft contracts had changed hands and were substantially final by the end of February 1998; indeed, a March 3, 1998 cover letter accompanying an executable copy of the Magicworks-CAA contract proclaimed CAA and its clients "ready to sign," (A-8712), and correspondence in January and February reflected revisions in terms at CAA's behest. (*See* A-15310-13; A-15332-33.)

On March 4, 1998, CAA's Rob Light sent Rowe a letter stating—falsely—that CAA and Jackson had just that weekend decided to do a 40-date tour. (A-8709.) The March 4 letter advised that CAA required a 50% deposit up front, with the remaining 50% to be secured by "irrevocable letter of credit," to be posted *before* the date tickets went on sale. *Id.* Light told Rowe he had until close of business that very day to match these terms. (A-8709; A-1362.) Rowe thus had several hours to raise $12 million, and was unable to do so.

Even if CAA's account were entirely truthful, Rowe would still be able to show that CAA refused to negotiate with him and gave him several hours to match a bid that Magicworks was able to work up over a period of several months, in consultation with CAA. Clearly, such

vastly disparate treatment, if racially motivated, is a legitimate predicate for a § 1981 claim.

(b) Comparison of Magicworks Terms And The Terms Offered Rowe

In any event, the Booking Agency Defendants' account is anything but truthful. Most importantly, it is an outright fabrication for Defendants to maintain that the terms offered Rowe on March 4 were as beneficial as the terms agreed to with Magicworks. The difference is massive. Under the March 4 letter, Rowe was required to post the entire guarantee—be that $11 million (as Defendants argue) or $12 million (as Rowe correctly calculated)—in *cold hard cash,* prior to the first on-sale date. Fifty percent was payable to the artist up front, for her immediate use, and the other 50% had to be irrevocably deposited into a bank account to secure a letter of credit. (A-8709.)

By stark contrast, Magicworks was required only to raise $5 million in cash.[3] (A-8713-19.) Far from having to raise $11 million or $12 million, Magicworks had only to commit $5 million in cash to buy the entire Janet Jackson tour. The remaining $6 million was to be paid from the owners of each concert venue to the artist out of the live gate receipts of each show, at $150,000 per show. (A-8714; Opp. Br. at 59). Under this arrangement, which the Booking Agency Defendants term "letters of direction," Opp. Br. at 59, Magicworks did not have to come up with one nickel of the $6 million prior to the tour or, indeed, after the tour began. Nor did Magicworks have to "guarantee" anything, except for the fact

[3] And even at that, some $2 million of that $5 million could be paid as late as the day before the first on-sale date, when there would already be little risk. (A-15302.)

that each site would pay the first $150,000 in receipts over to Jackson.[4]

The Booking Agency Defendants also distort the truth in arguing that Rowe's bid lacked essential terms such as advertising, production costs and the like. Opp. Br. at 58. Magicworks' bid letter and revised bid letter are no more detailed than Rowe's. (A-15333; A-15311.) All of these early-stage bid letters necessarily omit numerous terms, leaving them for a later date or long form agreement. But Rowe never got to that later stage, because CAA denied him the information required to prepare and submit a competitive bid.

(c) Kinzel Handwritten Note

The Booking Agency Defendants also go to great lengths to explain Carol Kinzel's handwritten note to "not divulge guarantee re Black promoters."[5] (A-15795.) Ms. Kinzel explains that CAA did not want Rowe to learn that it had offered a low-guarantee date to Larry Bailey. But two other facts cast doubt on this explanation: (i) Kinzel was acutely aware that Rowe had been aggressively lobbying for members of the Black Pro-

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[4] The Booking Agency Defendants display tremendous chutzpah in asserting that Rowe "had the opportunity to make an offer, negotiate terms, or submit a counteroffer" to the March 4 letter. Opp. Br. at 59. Defendants have a curious habit in this case of asserting that they should not be taken at their word. Whether it is Mr. Leff's written statement that he wrote the Mud Island letter at the behest of the Booking Agency Defendants (*see* A-664.35), or CAA telling Rowe that he must respond right away to match a $12 million offer, the defense of last resort appears to be: "Plaintiffs should not have believed us."

[5] Defendants claim the Plaintiffs omit from their quotation of the note the words "Dan Zelisco." The reference to Zelisco is on another line, however, and it is not obvious on its face that it relates to the black promoters comment.

moters Association to receive better financial terms and promoting opportunities from CAA; and (ii) she was aware that Larry Bailey was a member of the Black Promoters Association, even noting that fact in her declaration. A8000-06. Why would CAA and Ms. Kinzel need to hide from Rowe the fact that they had just done *exactly* what he had been begging them to do?

It is also significant that the Booking Agency Defendants fail altogether to address Plaintiffs' factual showing concerning the March 16, 1998 letter that Magicworks' Brad Wavra faxed to Ms. Kinzel at CAA for her to review before sending it along to Rowe. (A-8732; Rowe Br. at 25. This letter contains the bald-faced lie that the guarantees paid on the tour were $375,000 for the top markets and $325,000 for all other markets and that the same terms were being offered to all promoters. *Id.* The Booking Agency Defendants do not dispute that, in reality, while Rowe had to buy dates based on these inflated figures, Defendant Beaver was allowed to buy dates based on a $205,000 guarantee and a 10% deposit. (A-14285-86.) Nor do the Booking Agency Defendants dispute Plaintiffs' copious evidence showing that similar deposit and guarantee terms were given to many other white promoters on that tour. (*See, e.g.*, A-12753; A-12758-59; A-12762; A-12764; A-12767; A-12771; A-12805; A-12875; A-12877; A-13046-47; A-13049; A-13058-59; A-14285-86.)

3. Erykah Badu Concerts

Here again, Defendants are caught in a demonstrable untruth. In their opposition papers, Defendants essentially argue that, even if WMA's Lewis did lie to Boseman about when Badu would be touring (which they do not concede), it is immaterial because in New York, where Boseman was interested in promoting her, Ms.

Badu played only clubs that did not use an outside promoter, including The Supper Club and one other venue. (A-1511-12.) According to the Booking Agency Defendants, therefore, Boseman did not lose an opportunity because no outside promoter was used. Opp. Br. at 74.

The Booking Agency Defendants' assertion, however, is belied by a WMA spreadsheet reflecting the promotion of Badu's tour dates. (A- 10821-22.) That sheet lists the dates for the Supper Club shows and, in the column titled "Buyer" (*i.e.*, the promoter, if any, that bought the show from WMA) the document lists "Delsener/Slater Entertainment," a prominent white-owned promotional firm that was a Defendant in this action before settling with the Plaintiffs. (A-10822.)

4. Maxwell Tour

The Booking Agency Defendants take umbrage at Plaintiffs' argument that WMA first lined up the usual crew of white promoters to handle the 1998 Maxwell tour, and then superimposed Magic Johnson Productions onto the tour as a token tour promoter, without the power to choose or negotiate with its own local co-promoters. Opp. Br. at 69-70.

The record, however, fully supports Plaintiffs' position that this was an unparalleled exercise in pure tokenism. Indeed, on September 1, 1998 William Morris agent Matthew Burrows wrote Magic Johnson Productions that "*we* (*i.e.*, WMA) are negotiating with various local tour promoters for each engagement of the proposed tour" and that "you will be a co-promoter with each of the local tour promoters." (A-8986.) The letter leaves no room for doubt. Nor does the chart contained at A-14879, listing the dominant white promoters with whom WMA contracted, along with their deal terms, and

then superimposing in pen "Magic Johnson Productions" as a supposedly national promoter.

Rowe's showing that his offers bested the winning bids in major cities for the 1998 tour, moreover, stands unrebutted. The fact that the tour was "postponed" (A-19723-24) does not negate this fact.

5. The Mud Island Incidents

Defendants' opposition only underscores the existence of disputed factual issues regarding Mud Island. Defendants provide a competing factual account, arguing implausibly that Mayor Herendon never saw or was briefed on the letter from Beaver's Mr. Leff, and that Leff did not mean it when he wrote that his letter came at the behest of the major talent agencies.

It is an understatement to say that Plaintiffs possess circumstantial evidence that may cause a rational juror to doubt the veracity of Leff's claims and Herendon's testimony. The Booking Agency Defendants do not dispute this. What they argue is that Plaintiffs have failed to raise a triable issue here because they lack direct testimonial evidence that Leff and the former Mayor have been untruthful. Defendants' position is erroneous as a matter of law. As shown below at 32-33, Plaintiffs' circumstantial evidence on these points—detailed at Rowe Br. at 68-73—is far more than this Court requires to cast doubt on the testimony of a defense witness and defeat summary judgment.

In addition, the Booking Agency Defendants totally misstate the record regarding their, and Beaver's, actions in pulling the James Taylor concert away from Mud Island and Plaintiff Fred Jones. A letter dated April 17, 1998 from WMA confirms that it conspired with Beaver principal Don Fox to "cancel" the Mud Island dates for June 23 and 24, and to move the show to the Mid-South

arena venue where it could be promoted by an all-white promotional team consisting of Beaver and Susan Green. (A-11005; A-16401.) (This communication, which closes with "I'm awaiting an offer," also belies the assertion by the booking agencies that they do not affirmatively solicit promoters for bids).

6. Black Promoters And Defendants' White Acts

With one minor exception—Larry Bailey and Kenny G—it appears that the Booking Agency Defendants have never engaged—much less solicited—an African American promoter to promote the concert of a white client. The Booking Agency Defendants simply do not hire blacks to promote their white acts. If they had documents showing any such engagements, they would have produced them long ago. There are none. Certainly, there is not a shred of additional evidence in the record showing that a black promoter was engaged by a Booking Agency Defendant to promote one of its white acts.

In their opposition, the Booking Agency Defendants simply list white acts which they assert have been promoted in one concert or another by a black promoter, Opp. Br. at 16-17, citing the district court's decision. *Id.*, citing SPA-58; SPA-157. However, the white acts that the district court identified were all either (a) white acts that were simply opening acts for a black main event,[6] or (b) acts that were booked by someone *other than* the Booking Agency Defendants (or, at the very least, where there is no record evidence to show that a Defendant

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[6] Vanilla Ice supported MC Hammer (A-3635); Aguilera supported TLC (A-3636; A-3658; A-3669); Simpson and Dream supported Destiny's Child (A-3637-38; A-3694); AWB supported WAR (A-3069-70).

Booking Agency was involved in booking the promotion).[7]

The deposition testimony of African-American promoter Bill Washington is illuminating here. After enumerating the white acts that were later cited in the district court opinion, Mr. Washington testified:

> "We [black promoters] may once in a while get a token white act, and all the acts I named were nobody of significance. And one that was of significance was New Kids On The Block [but] that was not handled by William Morris or CAA or any of the bad guy agencies, it was handled by the Famous Artists Agency, Jerry Ayd, and that's why I got it. . . he was one of the good guys. . ."

(A-4813-14.)

In essence, the Booking Agency Defendants seek to wrap themselves up in the cloak of "the good guys," such as Jerry Ayd. Their defense to the charge that they never hire a black promoter for their white acts appears to be that some other agency, such as Mr. Ayd's, might not share Defendants' discriminatory contracting practices.

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[7] There is no evidence of Defendant involvement in: Bailey's 1970's promotions of Styx, Steppenwolf, Three Dog Night, Johnny Winter, Edgar Winter and Robin Trower (A-3096-3101); Darryl Brooks' engagement by Bill Graham to help with a Rolling Stones concert (A-3411); his similar involvement with rapper Eminem (A-3415) or his promotion of Conway Twitty or Waylon Jennings with white promoter Alex Cooley (A-3412-13); Haymon's promotion of Steely Dan via Rose Booking Agency (A-3633), Charles Aznavour (A-3638), Jean Luc Ponte (A-3699), Cleo Laine or John Dankworth (A-3705); or Washington's promotion of Michael Franks, Joan Baez, Rare Earth or AWB (A-4808).

7. Disparate Contractual Terms For Black Promoters And The Dominant White Promoters

As shown in the Opening Brief, Rowe Br. at 18-19, the default contractual term given by WMA and CAA to the dominant white promoters is a deposit of 0-10% of the artists' guarantee, while no black promoter (with the same single exception relating to Larry Bailey and his friend Kenny G) ever received terms below 50%. The 2650 contracts in the records bear out these claims; there are hundreds upon hundreds of examples of the white promoter members of the "fraternity" receiving 0-10% deposit terms from the Booking Agency Defendants,[8] and none of black promoters ever getting these terms.

While it is true that Plaintiffs below did not construct and analyze a randomized sample of the contracts in Defendants' database, as Defendants point out, this only means that Defendants' job is easier in refuting Plaintiffs' evidence. To refute Plaintiffs' claim that no black promoters ever receive from the Booking Agency Defendants the standard-issue 0-10% deal routinely given to the white members of the old boys network, the Booking Agency Defendants need only come forward with some counterexamples. This is not a sophisticated statistical argument. Plaintiffs do not purport to make extrapolations, requiring expert statistician testimony or data randomization. Plaintiffs assert simply that black promoters *do not receive* the favored terms. If Defendants had any such contracts in their databases, they would have been trumpeted to the heavens. A jury is entitled to conclude there are no such contracts.

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[8] There are thousands of contiguous pages of contracts in the record that contain *only* contracts containing the 0-10% deposit terms for dominant white promoters. *See, e.g.*, A-11249-64; A-11335-53; A-12008-14813.

Defendants further argue that the disparities in terms reflect only differences in financial strength and leverage as between promoters. The example of Al Haymon, however, in and of itself belies Defendants' arguments that the deposit terms are dictated by leverage. They assert that Mr. Haymon is far more successful than the vast majority of white promoters, that he has the financial wherewithal to post large deposits and that he has promoted many of the most successful artists in the business . Opp Br. at 16. And yet, Mr. Haymon—who signed on as a Plaintiff in this lawsuit before entering discussions to sell his promotion company to industry giant SFX (A-15623-25)—was nonetheless uniformly subjected to the "black rate" of 50% deposit terms. For instance, the record shows that Haymon promoted WMA's 1999 Lauryn Hill tour—a major undertaking that required $5 million in artist guarantees. (A-1591-92.) Critically, however, the record also shows that Haymon was required by WMA to post a 50% deposit prior to the on-sale date. (A-1591.)

Finally, Defendants assert that there are a number of contracts in which white promoters are given the 50% deposit terms. *See* Opp. Br. at 42-43. Plaintiffs do not dispute this evidence. But that is like the manager of the White's Only Country Club arguing, in his defense, that many white people have been denied membership too. It is hardly a defense.

8. Plaintiffs' Qualifications And Experience

Rowe was the lead promoter of the successful nationwide Sugar Daddy tour in 2000, comprising 122 dates at major venues throughout the U.S. (A-11164-77.) Defendants assert Sugar Daddy somehow does not "count"—either because it is allegedly more "gospel" than "R&B", or because it is more "staged" than ~~a ty~~pical concert or

rock opera—but this claim does not survive scrutiny.[9] On Sugar Daddy, Rowe (and co-promoters Boseman and King) booked the same venues, sold tickets via the same outlets, advertised in the same media, and dealt with all the same people and elements of promotion as in Defendants' major promotions. *Id.* Similarly unavailing are the attacks on Plaintiff Jones as a mere consultant for corporate events. Jones was the hands-on promoter at Mud Island for hundreds of shows, including shows by Defendants' clients. (A-15170.)

9. Testimony Regarding Generally Discriminatory Practices

Defendants' discriminatory practices are further borne out by the testimony of the experienced non-party black promoters whom Defendants enlist throughout their brief, such as Billy Sparks, Al Haymon and Bill Washington. Sparks confirmed that, in this industry if "you a nigger [you] don't fuck with no white act," and that even his friend at CAA, agent Jeff Frasco, has never "offered [Sparks] the opportunity to do any business at all with respect to white artists," or even cross-over acts. (A-10729; *see also* A-4769.) Haymon testified that he has experienced racially discriminatory behavior at the hands of both CAA and WMA, (A-5057), adding: "I've been treated unfairly by both and I've said that, you know, it's polio or cancer, which one is worse." (A-5055.) Washington, for his part, likewise testified to the discriminatory modus operandi of CAA and WMA, par-

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[9] It is totally irrelevant whether the musical genre of Sugar Daddy differs from the typical R&B, rock or pop musical show, which Plaintiffs dispute. Still, it is noteworthy that the lead singer in Sugar Daddy, Ralph Tresvant, is also lead singer of the mega-group New Edition, which Defendants cite as an example of a prominent act in their own brief at 16.

ticularly as regards their refusal to book top acts with black promoters. (A-4813-14.)

ARGUMENT

I.

GENUINE ISSUES OF MATERIAL FACT EXIST WITH RESPECT TO PLAINTIFFS' § 1981 CLAIMS BASED ON LACK OF NOTICE AND OPPORTUNITIES TO BID

The core of Plaintiffs' § 1981 claims is that they are not afforded an equal opportunity to contract for major acts represented by the Booking Agency Defendants. The Booking Agency Defendants routinely fail to provide Plaintiffs the notice and information that would be required in order to formulate and submit a competitive offer. The record contains hundreds of contracts which Plaintiffs were qualified to win, and upon which Plaintiffs would have bid if they had received adequate notice. The Kenny G/Toni Braxton tour, the Janet Jackson tour and the Erykah Badu dates represent but a handful of opportunities for which Plaintiffs were qualified but were denied information sufficient to allow them to submit wining bids.[10]

Plaintiffs thus seek injunctive relief, directing the Booking Agency Defendants to implement an open and race-neutral bidding notification system, as well as dam-

[10] The Maxwell claim is a bit different. On Maxwell, Rowe submitted the best, or tied-for-best bid on six separate tour dates and yet was rejected. The claim on Maxwell is that on these dates, Rowe should have had the same terms that were afforded the dominant white promoters who were given the position of being Magic Johnson's "co-promoters."

ages in connection with all of the contracts upon which Plaintiffs would have bid (or would have submitted more detailed or more competitive bids) if they had been given information and opportunities commensurate with those afforded their white counterparts.[11]

A. The *McDonnell Douglas* Test Is Satisfied With Respect To The Claims For Failure To Notify Of Bidding Opportunities

A review of the *McDonnell Douglas* elements makes clear that a genuine issue of triable fact exists with respect to Plaintiffs' claims based on the failure to provide notice of bidding opportunities.

1. The "Application Requirement" Is Deemed Satisfied

a. The Relevant Legal Standard

In their brief, Defendants fail utterly to deal with the case law establishing that a plaintiff cannot be required

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[11] Plaintiffs respectfully submit that the appropriate procedure, on remand, would be for the district court to allow Plaintiffs to list, in a pre-trial order, the date, venue, artist and other pertinent data concerning each contract for which each Plaintiff claims he would have been qualified, and on which he would have bid. These contracts, which number in the many hundreds and are too voluminous to list here, include by way of example: Celine Dion (A-878); Michael Bolton (A-884); Eric Clapton (A-905); Tool (A-961); Match-Box 20 (A-964); Sheryl Crow (A-977); Faith Hill (A-993); Korn (A-1046); Britney Spears (A-1057); Pearl Jam (A-1083); Stevie Nicks (A-12749); John Mellencamp (A-12761); Kiss (A-12770); Third Eye Blind (A-12790); Bob Dylan (A-12943). Notably, each one of these contracts is for a concert by an artist whom Plaintiffs expressed an interest in promoting. Plaintiff Jones, as just one example, had expressed an interest to Defendant Renaissance in promoting Britney Spears, A-1489-90, and would have sought to promote her Memphis concert of August 10, 1999, which went to Beaver. (A-1057.)

to show that she applied for a specific job where the employer fails to provide notice of the opportunity to apply. *Mauro v. S. New Eng. Telecomms., Inc.*, 208 F.3d 384, 387 (2d Cir. 2000). As the *Mauro* Court put it, "an employee by definition cannot apply for a job that he or she does not know exists." *Id.*; *see* Rowe Br. at 44-50.

Similarly, the Fourth Circuit recently held: "if the employer fails to make its employees aware of vacancies, the application requirement may be relaxed and the employee treated as if she had actually applied for a specific position." *Williams v. Giant Food, Inc.*, 370 F.3d 423, 431 (4th Cir. 2004). The Fourth Circuit relied explicitly on this Court's case law: "As the Second Circuit observed in *Mauro*, 'requiring the plaintiff to show that he or she applied for the specific jobs at issue would be unrealistic' where the employer did not post the vacancy." *Id.*, quoting *Mauro*, 208 F.3d at 387.

Nor do Defendants address the clear law establishing that the application requirement may be excused where the defendant maintains "an informal, secretive selection process," *EEOC v. Metal Serv. Co.*, 892 F.2d 341, 350 (3d Cir. 1990), or that, in such a case, "a plaintiff may raise an inference of intentional racially disparate treatment without proving that he technically applied for the promotion." *Id.*; *Roberts v. Gadsden Mem'l Hosp.*, 835 F.2d 793, 797 (11th Cir. 1988) (same); Rowe Br. at 47-48.

Much less do Defendants explain how the "application requirement" can pose a bar where the Plaintiffs' challenge goes to the provision of notice itself. Certainly, Defendants do not dispute that "relaxation of the application element of the prima facie case is especially appropriate when the hiring process itself, rather than just the decision making behind the process, is implicated in the discrimination claim or is otherwise sus-

pect." *Metal Serv. Co.*, 892 F.2d at 349; *Williams*, 370 F.3d at 431.

Indeed, Defendants fail to cite *any* of this case law, relying instead on garden variety discrimination cases in which Plaintiffs, having received notice of a job or promotion opportunity, are held to the uncontroversial requirement that they must have applied for the specific position at issue in order to maintain a claim. *See, e.g.*, *Brown v. Coach Stores, Inc.*, 163 F.3d 706 (2d Cir. 1998); *Brown v. Am. Honda Motor Co.*, 939 F.2d 946 (11th Cir. 1991). The entire point of the *Mauro* line of cases, however, is that this requirement cannot be applied where there is no notification of the opportunity to bid.

In the instant case, moreover, it is beyond dispute that the opportunities to submit bids to the Booking Agency Defendants were shrouded in secrecy. Indeed, in their brief, the Booking Agency Defendants trumpet the fact that these opportunities are not posted or published to market participants, but rather must be ferreted out by "proactive" promoters. Opp. Br. at 6-7, 39-40. This fact alone is sufficient to trigger the exception recognized in *Mauro* and *Williams*: because the opportunity was not publicized, "requiring the plaintiff to show that he or she applied for the specific jobs at issue would be unrealistic." *Mauro*, 208 F.3d at 387.

b. The Record Reflects Discriminatory Provision Of Notice Of Opportunities

In any event, the opportunities to contract with the Booking Agency Defendants *are* published—just to the favored white promoters. Plaintiffs have adduced letters notifying dominant white promoters of bidding opportunities, along with testimony that black promoters never received any such notice. Rowe Br. at 16-17. And it

stands to reason that, when a large star informs WMA that it wants to do a nationwide tour, the agency does not respond by sitting back and waiting for promoters to sniff out the opportunity. It calls promoters. CAA music head Thomas Ross, for example, testified that the way his agency has always "done business" is that, "once an act gave us a [touring] period, the general way an agent would go about booking a tour would be to call promoters." (A-5247.) Agent Dennis Ashley of WMA likewise testified that he would begin booking a tour "by calling promoters, calling promoters I do business with." (A-16777.)

Moreover, even where "proactive promoters" place calls to the booking agent, the promoter only learns of an opportunity if that call is answered or returned by the Booking Agency Defendants. Rowe can call, write or send smoke signals to Beverly Hills, but if Defendants do not provide him notice of an opportunity to bid, then he cannot compete for the contract.

A case in point is Rowe's attempt to bid on Eric Clapton. CAA's Robert Light acknowledged that Rowe specifically called him to inquire concerning dates for Clapton. Light also testified that CAA "gave notice to promoters of an upcoming tour of Eric Clapton;" that CAA made "outgoing calls for that purpose," that one or more Defendant promoters received contracts for Clapton dates; and that CAA never "made any outgoing calls [regarding Clapton] to any black promoter." (A-5171-72.) Light also confirmed he had no recollection of anyone at CAA ever getting back to Mr. Rowe and providing information "with respect to when Eric Clapton would be going on tour." (A-5173.)

Finally, the record reflects not only that Rowe placed innumerable calls to the Booking Agency Defendants seeking pertinent opportunities (*see, e.g.*, A-8961-64),

but the record here is bulging with letters from Rowe to the Booking Agency Defendants seeking opportunities on behalf of all Plaintiffs to promote their white and superstar black acts, including without limitation the following: A-15115 (to WMA); A-15116 (to CAA); A-15117 (to CAA); A-15122 (WMA); A-15124 (WMA); A-15125 (to WMA); A-15126 (to WMA); A-15127 (to WMA); A-15129 (to WMA); A-8961 (to CAA); A-1489-90. In addition, each of the Plaintiffs has plainly identified scores of acts represented by the Booking Agency Defendants which they would have liked the opportunity to bid on. (*See, e.g.*, A-5288-94; A-8892; A-8899; A-8906; A-8917; A-17744; A-17750; A-17768.)

2. The "Qualifications Requirement" Is Amply Met

The Booking Agency Defendants do not dispute that the relevant legal standard here is whether the plaintiff "possesses the basic skills necessary for performance of [the] job." *Owens v. New York City Hous. Auth.*, 934 F.2d 405, 409 (2d Cir.), *cert. denied*, 502 U.S. 964 (1991); *see* Rowe Br. at 38. Indeed, the Booking Agency Defendants do not even cite *Owens* or the other case law demonstrating that the district court applied the wrong standard in asking whether the Plaintiffs were as qualified as the dominant white promoters. *See id.*

Nor can the Booking Agency Defendants even contend that Plaintiffs' lack "the basic skills necessary for performance of the job," given the Plaintiffs' track record and experience. Rowe Br. at 40-41.

3. The Evidence Supports An Inference Of Discrimination

a. *Roberts* Factors: The evidence adduced by Plaintiffs clearly supports an inference of discrimination.

Indeed, the twin facts that the industry has no more than 1.4% black promoters, (A-2702; A-2752; *see also*, A-2741; A-2747), and that Defendants employ secretive word-of-mouth selection processes are, as a matter of law, sufficient to support the inference of discrimination. *See Roberts*, 835 F.2d at 797; *Metal Serv. Co.*, 892 F.2d at 350; *see also Williams*, 370 F.3d at 431; Rowe Br. at 47-51. True to form, Defendants fail to engage this case law altogether.[12]

(b) Disparate Terms; Black Promoters and White Acts: Further suggestive of invidious intent is the fact that, with one very minor exception, the Booking Agency Defendants simply do not engage African American promoters to promote their white acts. *See* above at 9 n.2. Likewise indicating racial animus is the fact that the members of the dominant white promoters club *routinely* receive 0-10% deposit terms, while even successful black promoters—such as Al Haymon and Leonard Rowe—*never* receive 0-10% deals, but instead must pay 50% deposits as a rule. *See* above at 20-22.

(c) Mud Island: The district court erroneously rejected the Mud Island evidence, upholding as "uncontradicted" the Mayor's testimony that he never received Leff's letter, and Leff's testimony that he was not writing at the behest of the booking agencies. Opp. Br. 30.

Concededly, naked incredulity about a witness's testimony, without evidentiary basis, is insufficient to defeat summary judgment. *Dyer v. MacDougall*, 201

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[12] Interestingly, one of Defendants' cases, *Brown v. Am. Honda Motor Co.*, 939 F.2d 946, 952 (11th Cir. 1991), makes the point that, in a *McDonnell Douglas* disparate treatment case, statistical evidence of low representation may not be terribly probative standing alone, but it "take[s] on a slightly more ominous hue when viewed in conjunction with [subjective hiring] criteria. . .".

F.2d 265, 269 (2d Cir. 1952). *Dyer*, however, has no application where circumstantial evidence could cause a rational juror to doubt the testimony. In *United States v. Mastropieri*, 685 F.2d 776 (2d Cir. 1982), defendant argued the government had no proof that he directed one Antonaccio to remove records from a room, given Antonaccio's unrefuted testimony that he acted on his own. The Court held defendant's position:

> amounts to saying that all facts must be proved by testimonial rather than circumstantial evidence—an assertion so preposterous that it need only be stated to be rejected. ... The case is readily distinguishable from *Dyer v. MacDougall* where the plaintiff had no evidence of the utterance of the slander except his claim that witnesses, whose testimony was against him, were flagrant liars. Here there was affirmative evidence. . . that Mastropieri called at the time and spoke to Antonaccio, and . . . that this talk was followed by the removal of the documents.

Id. at 791-92.

Here, the Mayor was committed for years to an exclusive contract for Mud Island; he orally reassured Jones after Kelley's death; his Commissioner received Leff's threatening letter, and he immediately announced the City would not extend its contract with the suddenly black-owned firm. *See* Rowe Br. at 68-70. *Mastropieri* is dispositive. Moreover, a reasonable fact-finder could infer the black mayor of a largely black city might lie about succumbing to powerful white talent agencies and stripping a local black businessman of major city contracts.

(d) Jackson; Badu; Maxwell; Kenny G Tours: In all of these tours, as set forth above and in the Opening Brief, Plaintiffs have been denied the notice and nego-

tiating opportunities afforded their white counterparts. These facts themselves may be taken by a reasonable juror as supporting the inference of discriminatory treatment. Further, WMA's blatant and cynical tokenism in installing Magic Johnson Productions as titular national promoter for the Maxwell tour betrays discriminatory intent, as do the facts regarding the participation of CAA and its agents Carol Kinzel and Rob Light in handling the "Black Promoter Issue." Rowe Br. at 26-28.

(e) Testimony: Finally, an inference of discriminatory treatment is supported by the general testimony of former WMA Agent Johnson (Rowe Br. at 13-15) and the black promoters discussed above at 20, 23-24.

4. Plaintiffs' Evidence Of Discrimination Is Not Barred As "Pattern-Or-Practice" Evidence

In a bizarre attempt to obfuscate the legal issues here, the Booking Agency Defendants argue that all of Plaintiffs' copious evidence concerning such issues as disparate contractual terms, the lack of black promoters of Defendants' white acts and the fact that only 1.4% of promoters are black is, somehow, evidence that is only appropriate in a so-called "pattern-or-practice case," which may be asserted only by the government or in a class action. This argument is just flat wrong.

Statistical evidence and evidence of a defendant's policies and usual practices are all, of course, fair game in a *McDonnell Douglas* disparate treatment case, as they bear on the questions of discriminatory intent and pretext. Indeed, in *McDonnell Douglas* itself the Court held that "facts as to the [employer's] general policy and practice with respect to minority employment" were highly relevant to the questions of intent and pretext.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973).

Moreover, as even Defendants' own cases recognize, "[s]tatistical evidence is an appropriate method for demonstrating both a prima facie case of discrimination and pretext." *See Am. Honda Motor Co.*, 939 F.2d at 952; *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88, 217 (1989) (to show discrimination and pretext in § 1981 case, a party is "not limited to evidence of a certain type;" rather, such evidence "may take a variety of forms" including evidence of "general policy and practice" of defendants).

Where Defendants obfuscate matters is by misusing the term of art "pattern or practice case." Opp. Br. at 46. Sometimes referred to as a "*Teamsters*-method case," the term "pattern or practice case" refers to an alternative to the *McDonnell Douglas* method of proving disparate treatment, under which the government, or a class action plaintiff, may avoid having to show that any particular plaintiff suffered injury, but must show *inter alia* that "racial discrimination [is] the company's standard operating procedure—the regular rather than unusual practice." *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 759-60 (4th Cir. 1998), citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 (1977). *Teamsters*-method cases carry their own burden-shifting regime and have a separate remedial inquest procedure. *Lowery*, 158 F.3d at 759; *see Williams*, 370 F.3d 429-30 n.3.

This entire foray into the world of *Teamsters* is a fool's errand. No court—anywhere, ever—has held that just because evidence of discriminatory policies may be sufficient to form the basis for a *Teamsters* method "pattern or practice" case it is somehow ineligible to serve as a predicate for finding discriminatory intent or pretext in

a standard *McDonnell Douglas*-method case. The notion is belied by *McDonnell Douglas* itself.[13]

Nor is a class action required to seek injunctive reformation of Defendants' bidding notification processes. Otherwise, no one could seek such relief because there are not enough professional black promoters in the U.S. to satisfy the numerosity requirement of Fed. R. Civ. P. 23(a). (A-2702; A-2741; A-2747.) It would surely be anomalous to say black promoters could only seek prospective relief if there were so many of them that the numerosity requirement were met.

5. Defendants Fail To Rebut Plaintiffs' Showing Of Pretext

It now appears uncontested that Defendants never sought or obtained financial or arrest records, or based any contracting decisions on such information. This justification is after-acquired evidence, sufficient to show pretext as a matter of law. *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 171 (2d Cir. 1993). Here again, Defendants fail to address the controlling case law.

The assertion that artists' managers made the challenged decisions is likewise pretext. Opp. Br. at 9-10. There is no evidence any manager ever asked Defendants *not* to notify a Plaintiff of an opportunity to bid. Much as Defendants insist, for example, that Roger Davies made the decision to accept Magicworks' 40-city proposal, they do not allege that Davies hatched the idea of giving Rowe four hours to come up with $12 million; or that Erykah Badu's manager asked Cara Lewis to lie to

[13] Defendants' position is like saying if an employee is discriminated against she may sue, but if discrimination is encouraged in a company Employment Practices Manual, she may not use that fact unless she has brought a class action or enlisted the EEOC to bring suit.

Boseman about the New York City dates. Nor is there any allegation that artists are responsible for deciding that only white promoters are eligible for 0-10% deposit terms.

Moreover, it suffices for establishing civil rights liability to show the defendant "played a meaningful role in the [selection] process," even if the defendant is not the "ultimate decisionmaker." *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 450 (2d Cir. 1999); Rowe Br. at 58. Here again, the Defendants fail to address this controlling case law.

B. The Grant Of Summary Judgment Dismissing The Discrimination Claims Against Promoter Defendants Should Be Reversed

1. Jones' Claims Against Beaver

The lynchpin of the district court's holding dismissing the claims against Beaver pertaining to Mud Island—including Jones's §§ 1981 and 1985(3) claims against Beaver and the Booking Agent Defendants—is the court's holding that Plaintiffs failed to adduce direct evidence contradicting: (a) Mayor Herenton's testimony that he never saw Leff's letter, and (b) Leff's testimony that he was being untruthful when he wrote in the letter that it was being written at the behest of the major talent agencies. Likewise, these facts form the sole basis of Defendant Beaver's Opposition Brief.

As demonstrated above, however, the district court erred in reaching this conclusion. Accordingly, triable issues of fact exist with respect to all of Plaintiff Jones's claims concerning Mud Island.

2. Claims Against Jam And Beaver By All Plaintiffs

At the outset, Plaintiffs do not allege that the Promoter Defendants are under any obligation to hire co-promoters for any of their shows, or to sub-contract out work related to their engagements. *See, e.g.*, Opp. Br. at 20-21. However, as set forth in the Opening Brief, Rowe Br. at 74 n.27, where the promoter *does* co-promote, it must do so without discriminating on the basis of race, under § 1981. Here, the record shows that the Promoter Defendants adhere to the same unwritten rule as the Booking Agent Defendants: no black promoters for white acts.

(a) Jam Productions: As set forth in the Opening Brief, Jam's principal Mickelson testified that they "have co-promoted every black show we have ever done with a black promoter" and yet neither Mickelson nor his partner was able to identify a single instance of co-promoting even one of their tens of thousands of white acts over the past 30 years with a black co-promoter. In their opposition, Jam argues (as the district court held) that its principals' failure to recall ever engaging a black co-promoter for one of Jam's white shows does not prove that Jam never did so. (*See* SPA-79; Opp. Br. at 16-17.)[14] In this, the district court applied an erroneous evidentiary standard to this Rule 56 motion. Surely, a reasonable juror could conclude based on the evidence adduced that Jam adheres to the same unwritten code as the Booking Agency Defendants proscribing the pro-

[14] In the opinion, SPA-80, the district court cites to a statement that a black dance promoter claims to have worked with Jam once on an event featuring comedian Rosie O'Donnell as well as the Average White Band—a band who served as an opening act for the black act War. *See* above at 19 n.6. But even this is uncorroborated by Jam in the record.

motion or co-promotion of white acts by black promoters.

(b) Beaver Productions: Over 20 years, thousands of concerts and innumerable co-promotions, it appears on the instant record that Beaver has worked with a black promoter on a white act exactly one time—the by-now-familiar exception of the Larry Bailey-Kenny G team. (SPA-103.)

II.

PLAINTIFFS' SHERMAN ACT CLAIMS RAISE TRIABLE ISSUES OF FACT AND THE TRIAL COURT'S DISMISSAL OF THEM SHOULD BE REVERSED

To survive summary judgment, Plaintiffs needed only to present evidence that would "satisfactorily cast doubt on inferences of independent action or proper conduct by defendants." *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.* 386 F. 3d 485, 507 (2d Cir. 2004); Rowe Br. at 78. Viewed under this standard, it is plain that Plaintiffs presented sufficient evidence to defeat Defendants' motion with respect to Plaintiffs' antitrust claims alleging horizontal territorial market allocation scheme.[15]

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[15] Defendants' own cases demonstrate the leniency with which an antitrust plaintiff's proof is to be reviewed on summary judgment. *See, e.g., Invictus Records, Inc. v. Am. Broad. Cos.*, 98 F.R.D. 419, 426 (D.C. Mich. 1982) ("The movant's papers are to be closely scrutinized while those of the opponent are to be viewed indulgently.")

A. Plaintiffs Challenge A *Horizontal* Territorial Allocation Scheme, Which Is Subject To A Per Se Standard

The Booking Agency Defendants concede that, to the extent Plaintiffs have pled a horizontal territorial allocation scheme, the trial court was obligated to analyze these claims under a per se standard. Opp. Br. at 82; Rowe Br. at 76-78. But the Booking Agency Defendants assert that Plaintiffs only have presented evidence of a vertical agreement to allocate markets, to which a rule of reason standard applies. Opp. Br. at 82-83. This position is flatly incorrect.

Defendants assert that the conspiracy at issue here is a vertical one because the Booking Agency Defendants facilitated the promoters' territorial allocation scheme. Opp. Br. at 82. Defendants are wrong. Just because the Booking Agency Defendants participated in and facilitated the Promoter Defendants' territorial allocation scheme does not convert the conspiracy from a horizontal to a vertical one. *See In re Mercedes-Benz Antitrust Litig.*, 157 F. Supp. 2d 355, 362 (D.N.J. 2001) ("the law is settled that where an upstream supplier participates in a conspiracy involving horizontal competitors, it is proper to analyze the entire restraint as . . . horizontal" and subject to per se standard), citing *United States v. Gen. Motors Corp.*, 384 U.S. 127 (1966); *Lovett v. Gen. Motors Corp.* 769 F. Supp. 1506, 1517 n.20 (D. Minn. 1991).

Nor is there any question that a horizontal scheme is at issue in this case. (*See* A-129; SPA-30 (acknowledging the complaint alleged territorial allocation scheme among Promoter Defendants) and A-130-31; SPA-30 (noting allegations of territorial allocation agreement among Booking Agency Defendants).) Plaintiffs' proof

of this horizontal conspiracy, moreover, was far from "isolated," and included:

- pre-existing agreements to allocate the Bay Area market among select promoters and exclude other competitors (A-10985-987; SPA-34);
- agreement among certain promoters to allocate the Memphis promotion market (A-761);
- meeting of Beaver and other promoters and booking agency representatives in Memphis in 1998 at which the allocation of Memphis market was discussed (A-800; A-815; A-858);
- cancellation by WMA of James Taylor concert in furtherance of above agreement (A-17843);
- testimony of veteran promoter Kapp that certain promoters controlled designated regional markets (A-5104-08);
- testimony of former WMA Agent Johnson, which the district court improperly excluded (Rowe Br. at 14), that each major U.S. market was controlled by one dominant promoter; and
- documentary evidence from CAA's files showing territorial division of certain geographic markets among promoters. Rowe Br. at 79; A-5481.

Whether or not this evidence (and other record proof) is sufficient for Plaintiffs to sustain their burden of proof at trial, it plainly was sufficient to "cast doubt" on any inference that the Promoter Defendants were acting independently, and the Booking Agency Defendants' characterization of it as "isolated" does not alter this conclusion. *Geneva Pharm. Tech. Corp.*, 386 F. 3d at 507.

B. Plaintiffs Have Presented Sufficient Evidence Of Antitrust Injury To Warrant A Trial

The Booking Agency Defendants and Beaver offer a misguided defense of the trial court's finding that Plaintiffs had failed to present sufficient evidence of antitrust injury resulting from the conspiracy to allocate the promotion market among select promoters.[16] They make two basic points in this connection: (1) Plaintiffs fail to show that they were injured by the specific pricing consequences of Defendants' allocation scheme; and (2) Plaintiffs offered no expert testimony to support their claim of antitrust injury. Each of Defendants' arguments is fundamentally flawed.

First, Plaintiffs' evidence of antitrust injury was not primarily focused on the price impact of the conspiracy; rather, Plaintiffs' evidence shows that, as a result of the agreement among the dominant promoters (and the Booking Agency Defendants) to allocate the promotion market over many years, Plaintiffs were effectively excluded from the relevant market for promotion of concerts.[17] *See* Rowe Br. at 83-84. In a Sherman Act challenge to a market allocation, boycott or similar scheme, a plaintiff can establish antitrust injury with proof that it was excluded from the market as a result of the injury. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 482-84 (1982) the Court noted that "while an increase in price resulting from a dampening of competitive market

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[16] Defendant Jam is correct to assert that Plaintiffs did not appeal the trial court's June 2000 Opinion & Order dismissing with prejudice the antitrust claims against Jam.

[17] The specific definition of the relevant concert promotion market is of no moment. In a per se case like this one, "no market definition is required." *Mercedes-Benz*, 157 F. Supp. 2d at 359.

forces is one type of" antitrust injury, "that is not the only form of injury remediable" under the Clayton Act, and it specifically held that competitors excluded from a market as a result of defendants' alleged anticompetitive scheme to limit competitors suffered antitrust injury. *See also Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, No. Civ. A. 02-CV-4373, 2005 WL 724117 (E.D. Pa. Mar. 29, 2005) (defendant's summary judgment motion denied; plaintiff's loss of business due to exclusion from competing in market subject to alleged allocation scheme satisfied antitrust injury requirement); *Biovail Corp. Int'l v. Hoechst Aktiengesellschaft*, 49 F. Supp. 2d 750, 772 (D.N.J. 1999) (same); *Bon-Ton Stores, Inc. v. May Dep't Stores Co.*, 881 F. Supp. 860, 878 (W.D.N.Y. 1994)(same).[18]

In addition, Defendants argue that it is irrational for the sellers of the shows, the Booking Agent Defendants, to have been complicit in a conspiracy among buyers (promoters) which presumably deflated the prices paid for shows. But it is not necessarily irrational for the sellers to cultivate, in this fashion, a club of dominant promoters, and thereby solidify their hold on the industry and their unique ability—prized above all else—to create stars by activating their loyal networks.

Defendants are likewise incorrect that Plaintiffs' decision not to present an expert affidavit in support of their claim of antitrust injury somehow warranted the trial court's summary judgment order. Although expert tes-

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[18] Nor is evidence of increased prices remotely necessary to a per se horizontal conspiracy claim. A conspiracy among buyers to depress prices is illegal per se just like a conspiracy among sellers to inflate prices. *See Assoc. Gen. Contractors of Calif., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529 n.19 (1983); *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

timony may supply probative evidence of antitrust injury, it is by no means a blanket requirement for presenting a Sherman Act claim. Plaintiffs here were entitled to, and did, present other competent evidence that the Promoter Defendants conspired among themselves and with the Booking Agency Defendants to exclude Plaintiffs from the market, and that Plaintiffs in fact were excluded as a result. *See Callahan v. A.E.V., Inc.*, 182 F.3d 237, 241 (3d Cir. 1999) (plaintiffs' own testimony concerning lost customers as a result of conspiracy was competent, admissible evidence of injury).

CONCLUSION

For all the foregoing reasons, and those set forth in the Plaintiffs' Opening Brief, Plaintiffs respectfully request that this Court reverse the judgments below.

Dated: New York, New York
August 22, 2005

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B)(ii) because:

1. This brief contains 10,257 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14 point font Times New Roman.
3. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count of this word-processing system in preparing this certificate.

/S/ KEILA D. RAVELO
Keila D. Ravelo
Counsel for Plaintiffs-Appellants

Dated: August 22, 2005

[LETTERHEAD OF BEAVER PRODUCTIONS]

April 20, 1999

Wayne Boyer
Director of Parks Commission
Via Fax No. (901) 454-5275

Wayne;

I understand today you are considering an exclusive agreement on the future of Mud Island this summer. I want to inform you that because of the unfortunate circumstances with Mid-South Concerts, my company has been asked by the top talent agencies in the country to establish an office in Memphis and begin immediately booking all venues in the area. We produce about 200 shows. across North America every year, and because of our relationship with Bob Kelly we have always stayed out of your market.

As of this past Friday, we have hired Susan Green, former V.P. of Mid-South Concerts. We are in the process of opening an office in Memphis and plan to hire additional staff members. We have already begun to actively pursue shows in the market and are very much looking forward to doing shows in your facility.

If however, an exclusive agreement is entered into with any other party, it will cause us to take our shows to other facilities in the market. I want to make it clear that we understand your concern for getting shows into Mud island this summer, and we *can* and *will* help you do that. I would like to suggest because of the timing of all the events that have surrounded the 1998 season, that you keep your facility open to all promoters this sum-

mer. This will allow you to judge the true intent of all outside promoters.

Beaver Productions is very excited about our future in Memphis. Please keep your doors open and allow us to show you what a great business relationship we can have together.

Sincerely,

/s/ BARRY LEFF

BARRY LEFF

WASHINGTON **[146]** Q. Who do you recall being on the phone?

A. Some of those people that you named.

Q. Which ones do you recall, sir?

A. There were some of them, I don't know which ones specifically, where, there may have been some of them. I don't remember which ones, the. specifics.

Q. But as you sit here today, your recollection is that it was one or more of Mr. Jones, Mr. King, Mr. Boseman and Mr. Rowe?

A. Yes.

Q. When was this conversation, to the best of your recollection?

A. Well, I don't know.

Q. Was it more than three years ago, for example?

A. Well, it hasn't been in the last year. I know that much. But the general consensus of our conversation, which we are saying now, was that we are not given the opportunity to buy white acts.

We may once in a while get a token white act, and all the acts I named were nobody of significance. And one that was of significance

* * *

[00466] of time when Eric Clapton was represented by CAA, Inc.?

A. Yes, sir.

Q. Which of them?

A. Again, without an itinerary I can't answer specifically, but I would think the great majority.

Q. More than once?

A. Yes, sir.

Q. Did one or more of defendant promoters in this action ever promote Eric Clapton during the period of time that he was represented by CAA LLC?

A. Yes, sir.

Q. Which of the defendant promoters?

A. Again, without an itinerary, hard to answer, but I would think; the great majority.

Q. More than once?

A. Yes, sir.

Q. Did CAA, Inc. ever give notice to promoters of an upcoming tour of Eric Clapton?

A. Yes, sir.

Q. Did CAA ever make outgoing calls for that purpose?

A. I believe so.

Q. Did CAA ever make outgoing calls to any black promoter with respect to CAA, Inc., ever make **[00467]** any outgoing calls with respect to Eric Clapton to any black promoter?

A. Not to my knowledge, but similarly we wouldn't have reached out to country promoters, Latin proposals, Christian promoters, fair promoters or small independent white promoters either.

Q. Did CAA LLC provide notice of any upcoming tour of Eric Clapton to any promoters?

A. I believe so.

Q. Did CAA LLC make outgoing calls for that purpose?

A. I believe so.

Q. Did CAA LLC make outgoing calls to any black promoter for that purpose?

A. The same as the last answer, nor black promoters, Christian promoters, Latin promoters or country promoters or small independent white promoters.

Q. Did Leonard Rowe ever make inquiry of CAA LLC with respect to Eric Clapton?

A. Yes, he did.

Q. Do you recall when that was?

A. No, sir, I do not.

Q. Do you know whether it was prior to the commencement of this lawsuit?

[00021] working period, the general way an agent would go about booking a tour would be to call the promoters.

What I changed in that process is I made our agents go to the buildings and become ongoing friends and develop relationships with the various building managers so that if we were going to make a deal with the building from one of our major acts—we used to go to the promoter and let them who were in the market, living with the building manager, make a deal at—a preferential deal could be made, and they all had preferential deals, and they were based on volume. I felt the volume should be based on the agency.

So we would oftentimes after we developed the relationship go to the building first, cut the deal, and then plug in the promoter of favor with the attraction.

It didn't always happen, but that was the general—I thought that was a wrong concept that the business had inherited, and we changed that.

I wanted the acts to not be flipping from agent to agent, agency to agency. I tried to instill a loyalty with not only the agents, but

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210. The only reasons black promoters had any involvement in the 1998 Janet Jackson tour were because Janet Jackson insisted on black involvement as a condition in her contract and the Black Promoters Association threatened to picket and boycott.

211. Lionel Bea, Darryl Brooks, Freddy Luster, and Quentin Perry are black promoters who have never promoted *any* white act. Billy Sparks used to be a promoter.

212. CAA selected the promoters to promote Kenny G and Toni Braxton. CAA's selections were then approved by Kenny G and/or his manager, Dennis Turner. With the exception of black promoter Larry Bailey, who had a well-established professional relationship with Kenny G and Mr. Turner, and who obtained dates *only* at the insistence of Kenny G and Mr. Turner, CAA selected *only* the usual dominant white promoters for this tour. Prior to the intervention of Mr. Turner, CAA had refused to give Mr. Bailey (or any other black promoter) dates for the 1997 Kenny G/Toni Braxton tour. It was CAA—not Kenny G and his manager—who *initially* selected the promoters and set the financial terms for the tour.

213. Toni Braxton was critical to the success of the 1997 Kenny G/Toni Braxton tour. In fact, when Ms. Braxton attempted to withdraw from the tour in order to tour by herself as the headline act, she was sued and was required to honor her contract with Kenny G.

214. In 1995, Al Haymon and I co-promoted approximately five dates on the Frankie Beverly tour.

When Mr. Haymon inquired of me which artist we should use as the opening act for Mr. Beverly, I suggested Toni Braxton, who at that time was an unknown artist with her first new CD. Mr. Haymon agreed to use Ms. Braxton; he secured her for the tour and I was responsible for the advertising in the markets in which he was involved.

215. In 1996, Al Haymon called me and told me that Kenny G and Toni Braxton were going to tour in 1997. Mr. Haymon told me that the guarantee was about $250,000 to $275,000 depending on the city and that it was his opinion that the guarantee was too high. I then called Mike Piranian, the responsible CAA agent for the tour, to discuss the possibility of involvement in the tour. I spoke with Mr. Piranian several times about this matter, and during some of those conversations Mr. Boseman was on the line because he, too, was interested in buying dates for the tour and he, too had promoted Ms. Braxton in 1995. Mr. Piranian told me in an arrogant and confrontational manner that the guarantee was $225,000 to $275,000 and to just pay the 50% deposit if I wanted to be involved. At one point Mr. Piranian told

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of same, would cause each of the defendants significant damage to their competitive position, by affording, for example, the plaintiffs and promoter defendants a competitive advantage against me promoter producing the information, and affording promoters as a whole a competitive advantage against booking agents.

3. Based on my experience at WMA, and on my continuing familiarity with the concert booking and promotion business, the "competitive industry" described by defendants simply does not exist. On the contrary, each major market in the United States is controlled—essentially by one primary or dominant promoter, whose identity is well known among all the major booking agents: Delsener/Slate, for example, in New York City, Electric Factory in Philadelphia, Pace in Houston. When a white artist represented by WMA wanted to have a concert in one or more cities, or stage e nationwide tour, there was no competitive "bidding" process, in which WMA engaged in arms-length bargaining with several promoters in each major venue in order to get the best deal for themselves and their artists. Agents, who were also organized by territory, instead were instructed to book their dates through the dominant promoter in his or her market. Agents would typically not reach out to any promoter other than the one that controlled his respective territory, and if any unsolicited offer or bid came to an agent from a secondary promoter, it would likely never leave his or her desk. It is my understanding that the other major booking agents maintain the same practice with the same territorial promoters.

4. These relationships between the booking agents and the dominant promoter in each region were virtually unbreakable. WMA's interest in giving as much lucrative

business as possible to the same promotor ensured that the promoter would also promote less prominent (but potentially more promising) acts. The only way in which an act might be booked through a secondary promoter in any given market is if the primary promoter did not wish to promote the act and the agent did not insist upon it.

5. WMA also had a sharp division while I was there—that I believe still exists—between what were considered "white acts" and "black acts." I can recall no instance while I was employed at WMA in which a white artist was promoted by a black promoter. Moreover, in the event that a black artist gained cross-over appeal and became a major star, those acts were no longer considered "black," and were handed over to a white promoter, not through the black promoter who may have formerly developed the act, unless and until that artist's popularity began to fade, in which case their business could be handed back to the black promoter.

6. This is how the concert booking and promotion business worked at WMA while I was there, and, upon information and belief, continues to work. In this light, the contention by defendants that the information to be produced is highly secret and sensitive, and if disclosed will harm competition, simply makes no sense. Again, major promoters—the promoter defendants in this case—do not compete with each other and control their respective markets. Disclosure of financial information from defendants' files would not change the way this business operates.[1] The major agents—defendants in this

[1] SFX now owns the vast majority of the promoter defendants named in this action: Even were such "cross-border" competition suddenly to appear, it would probably all be intramural.

case—will still use the same primary territorial promoters among whom there is no competition.

7. The financial information on the concert file—*i.e.*, the splits, guarantees and deposits—is not sensitive for the additional reason that it is not particularly critical to the promoters or agents in negotiating the terms of a concert to know what those terms were in the

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FRED JONES, JR. **[350]** no idea about that, the number of them.

Q. Did anyone tell you that you would not be permitted to promote at Mud Island for the 1998 season?

MR. PRIMOFF: Objection to the form.

A. No one told me that, but I had an incident that happened that made it clear to me that it was going to be difficult to do the types of things that we had done prior to the conversation I had with Shelly Schultz who was the agent for James Taylor at William Morris. And Kenny DiCamillo was on the line as well.

They had booked James Taylor for June, a date at Mud Island, in '98. And I talked to them about that and they said that they were going to make other arrangements. In other words, they would not play the show for me at Mud island.

Q. When you say that a show was booked for James Taylor at Mud Island in the 1998 season, were there any documents reflecting such a booking?

A. Well, again, you guys not being in the business, there were other shows that were on **[351]** the books at Mud Island at the time of Bob's death.

Q. I'm asking you a specific question. Did you have a signed contract with respect to James Taylor for Mud Island for the 1998 season? It's really a simple question, Mr. Jones.

MR. PRIMOFF: Objection to the form of the question.

A. Yes.

MR. PRIMOFF: Stop badgering the witness.

Q. I'm sorry, you did?

A. The only way you can answer that, and I know you are trying to I'm going to give you the basis of what you need to answer that question. No, there was not a signed contract for the season.

In fact, you didn't have the exclusive right to promote at Mud Island, did you?

MR. PRIMOFF: Objection to form.

Q. For the 1998. season?

MR. PRIMOFF: When? And who is "you"?

[352] A. As part of—the board had voted, the Park Commission board had voted to give the exclusive right for Summitt Management to have the exclusive on Mud Island.

Q. But the mayor had never signed a contract to that effect, had he?

A. No.

Q. And the mayor subsequently decided that he did not wish to sign such a contract, isn't that correct?

MR. PRIMOFF: Objection to the form.

A. I didn't know that at that time.

Q. But you learned it subsequently, did you not?

MR. PRIMOFF: Objection to form.

A. Subsequent, yes.

Q. On April 22nd, 1998?

A. Yes.

Q. When did the communication that you say took place with Shelly Schultz and Kenny DiCamillo occur?

A. Either the 20th or the 21st.

Q. Was anyone else participating in that communication?

[353] A. No.

Q. Was it in person or by telephone?

A. By telephone.

Q. You're certain of that?

A. I'm positive.

Q. Did you make any notes of the communication?

A. No.

Q. Do you ever make notes of any telephone conversations that you have?

A. Very rarely.

Q. What did Mr. Schultz or Mr. DiCamillo tell you in that communication which you say took place on April 20th or 21st?

MR. PRIMOFF: Objection to the form.

A. I said to them that I was going to continue doing the shows over in Mud Island. I knew that they had James Taylor. It had been communicated to u s earlier that they're playing Mud Island. They said that they were going to make some changes because obviously in their minds, as they said, some changes had been made in Memphis.

That was the second time I heard

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WILLIAM E. SPARKS **[164]** I'm 52 years old. I've been to college, been on the streets, okay? Don't take me long to find out what's the lay of the land, okay? When I was in college I got the real understanding that you a nigger, don't fuck with no white act. Excuse the expression.

MS. FRANK: Move to strike as nonresponsive.

A. How am I nonresponsive? I already know it intuitively. I already know it intuitively. You know you do not go that way, okay? You do not call no agent, being stupid, like you're some stupid nigger calling me about Mariah Carey. Don't waste your time, nigger. Do something else. It's all a waste of time.

Now, I been doing this for a long time, lady. Intuitively, give me some love here, some understanding here, I know, okay, I don't have to go down that road because there ain't nothing happening for me. I ain't got to call nobody to know that. Look, this man ain't never had none, this man ain't never had none. What makes Billy Sparks the new kid in down that's going to get busy? They never call me. I don't even think about it, lady. I don't even think about it.

* * *

result, it was no longer economically feasible for me to promote concerts on a non-exclusive basis at Mud Island. Because of this economic reality, only a handful of shows have played at Mud Island since Island Events's exclusive promoting agreement ended and the City of Memphis has lost millions of dollars as a result. As a result of being unable to promote concerts at Mud Island, my company has lost a minimum of $300,000 per year from 1998 through 2000, and also lost the opportunity to obtain an exclusive promotion agreement at Mud Island thereafter and the monies such an agreement would have generated.

35. But for the interference of WMA and other "top talent agencies in the country" and Beaver Productions, I would have continued promoting exclusively at Mud Island.

36. Prior to Kelley's death, Island Events had an agreement with WMA to promote James Taylor at Mud Island on June 23-24, 1998.

37. After Kelley's death, James Taylor's June 23-24, 1998 shows would have been promoted solely by me.

38. Shelley Schultz ("Schultz"), an agent at WMA, represented James Taylor.

39. Schultz and Kelley had been close friends for 30 years.

40. After Kelley died, WMA cancelled James Taylor's performances at Mud Island.

41. Upon cancellation of James Taylor's June 23-24, 1998 performances at Mud Island, WMA simultaneously rescheduled James Taylor for a single performance on June 24, 1998 at Mid-South Coliseum in Memphis.

42. On April 17, 1998, WMA confirmed that it was giving James Taylor's planned Memphis performance to Don Fox, a white promoter and owner of Beaver Productions, with whom WMA regularly conducted business, the same Beaver Productions who wrote on April 20, 1998 that the

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Exhibit 1

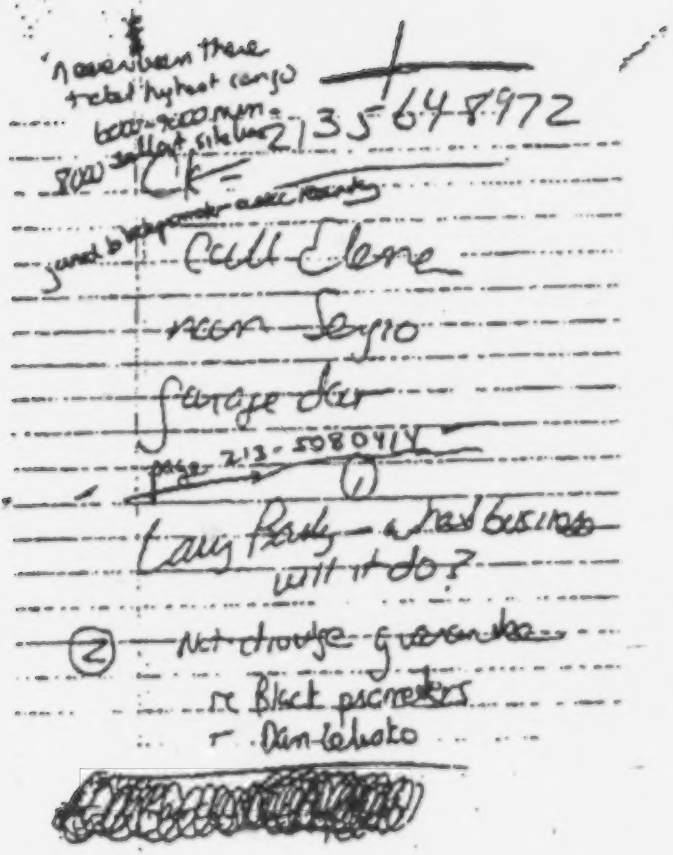


EXHIBIT
PAGES 1 DATE 4-16-02
NORMA L. GADDISON, CSR

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ASHLEY [31] Did I say Philadelphia?

MR. DISARRO: No.

THE WITNESS: Philadelphia. Albany, New York, Boston, Detroit and that's about it,

Q. Okay. You testified that management asked you to commence the process of soliciting offers—

A. Correct.

Q. —for those dates?

A. Correct.

Q. Did you, in fact, commence the process of soliciting offers?

A. Yes.

Q. How did you go about that?

A. Basically, calling promoters, calling promoters who I do business with.

Q. Okay.

A. Or calling promoters who were either involved possibly involved in the last tour, promoters that I do business with, and that's how I arrived at it.

Q. Okay. Do you recall whether you contacted any promoters with respect to the New York City date or dates?

A. Yes.